

NO. 2015-CA-00190-SCT

IN THE SUPREME COURT OF MISSISSIPPI

JERRY WAYNE ATWOOD,

Appellant,

vs.

STATE OF MISSISSIPPI,

Appellee.

On Appeal from the Circuit Court of Wayne County, Mississippi

BRIEF OF THE APPELLANT

Oral Argument Requested

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**CERTIFICATE OF INTERESTED PERSONS
NO. 2015-CA-00190-SCT**

JERRY WAYNE ATWOOD

APPELLANT

vs.

STATE OF MISSISSIPPI,

APPELLEE

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal:

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This the **22nd** day of May, 2015

s/ Jacob W. Howard
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TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES.....	iii
STATEMENT REGARDING ORAL ARGUMENT.....	1
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	1
<i>Relevant Facts and Procedural History</i>	3
SUMMARY OF THE ARGUMENT	8
STANDARD OF REVIEW.....	9
ARGUMENT	10
I. The Penalty Imposed On Mr. Atwood Is Unlawful Because It Exceeds The Maximum Period Of Imprisonment Authorized By Statute For The First Technical Violation Of A Condition Of Post-Release Supervision.....	10
II. The Legislature’s Amendments To The Statutorily Authorized Penalties For Certain Violations Of Post-Release Supervision Are Not Unconstitutional.....	12
III. Section 99-19-29 Does Not Authorize A Circuit Court To Impose Or Revoke A Term of Post-Release Supervision And Thus Is Not Relevant To This Case.....	21
CONCLUSION	23

TABLE OF AUTHORITIES

CASES

<i>Carter v. State</i> , 754 So.2d 1207 (Miss. 2000)	15
<i>Clark v. State</i> , 858 So.2d 882 (Miss. Ct. App. 2003).....	23
<i>Daniels v. State</i> , 742 So.2d 1140 (Miss. 1999)	11, 12, 14
<i>Fisher v. State</i> , 690 So.2d 268 (Miss. 1996)	14
<i>Foreman v. State</i> , 51 So.3d 957 (Miss. 2011).	10
<i>Gilmer v. State</i> , 955 So.2d 829 (Miss. 2007)	15, 22
<i>Johnson v. State</i> , 925 So.2d 86 (Miss. 2006)	15, 22
<i>Johnson v. Sysco Food Services</i> , 86 So.2d 242 (Miss. 2012)	9
<i>Jones v. City of Ridgeland</i> , 48 So.3d 530 (Miss. 2010)	14
<i>Miller v. French</i> , 530 U.S. 327 (2000)	16, 17
<i>Miller v. State</i> , 875 So.2d 194 (Miss. 2004).....	15
<i>Moore v. State</i> , 585 So.2d 738 (Miss. 1991)	16
<i>Parker v. State</i> , 119 So.3d 987 (Miss. 2013).....	14
<i>S. Pac. Lumber Co., Inc. v. Reynolds</i> , 206 So.2d 334 (Miss. 1968)	14
<i>State ex rel. Pitman v. Ladner</i> , 512 So.2d 1271 (Miss. 1987)	11
<i>Tipton v. State</i> , 150 So.3d 82 (Miss. 2014)	9
<i>USPCI of Mississippi, Inc. v. State ex rel. McGowan</i> , 688 So.2d 783 (Miss. 1997)	11
<i>Washington v. State</i> , 478 So.2d 1028 (Miss. 1985)	13
<i>Williams v. State</i> , 708 So.2d 1358 (Miss. 1998)	14

STATUTES & CONSTITUTIONAL PROVISIONS

Miss. Const. Art. 1, Sec. 1	1, 2, 12
Miss. Const. Art. 1, Sec. 2	1, 2, 12
Miss. Const. Art. 6, Sec. 144	14
Miss. Code Ann. § 47-7-2	5
Miss. Code Ann. § 47-7-34	<i>passim</i>
Miss. Code Ann. § 47-7-37	<i>passim</i>
Miss. Code Ann. § 47-7-38.1	5, 20
Miss. Code Ann. § 97-17-14	3
Miss. Code Ann. § 99-19-29	<i>passim</i>
Miss. Code Ann. § 99-39-1	8

OTHER AUTHORITIES

<i>Black's Law Dictionary</i> 1203-04 (6th ed. 1990)	14
Miss. Corr. and Crim. Justice Task Force, <i>Final Report</i> (Dec. 2013)	<i>passim</i>

STATEMENT REGARDING ORAL ARGUMENT

This case involves a Circuit Court's *sua sponte* declaration that, as applied to Appellant Jerry Wayne Atwood, a statute passed by the Legislature and signed by the Governor violates the separation of powers doctrine enshrined in Article 1, Sections 1 and 2 of the Mississippi Constitution. Given the important questions raised by the Circuit Court's decision to hold the statute unconstitutional, oral argument should be granted in this case.

STATEMENT OF THE ISSUES

1. Whether the Legislature – which authorized circuit courts to impose and revoke terms of post-release supervision in the first place – may seek to improve public safety and control the skyrocketing costs of incarceration by amending the statutorily authorized penalties for certain violations of the conditions of post-release supervision.

2. Whether a Circuit Court may rely on Miss. Code Ann. § 99-19-29 for the authority to revoke a term of post-release supervision and impose a period of imprisonment, despite the fact that the post-release supervision statute clearly states that such revocation proceedings are governed by Miss. Code Ann. § 47-7-37.

STATEMENT OF THE CASE

Based on the recommendation of its bipartisan, inter-branch Corrections and Criminal Justice Task Force – which was tasked with developing policies to improve public safety and control corrections costs – the Legislature decided in 2014 to modify the statutorily authorized penalties for violations of the conditions of probation and post-release supervision. Among other things, the Legislature elected to amend Miss. Code

Ann. § 47-7-37 to provide that no more than ninety (90) days imprisonment may be imposed for the first “technical violation” of a condition of supervision.¹ These amendments were driven, in part, by the recognition that in fiscal year 2012 “more offenders entered prison [in Mississippi] from a revocation from supervision (5,481) than from a new criminal sentence (4,973),” and that “75 percent of th[ose] offenders entering prison on a revocation of probation were revoked on a technical violation.” Mississippi Corrections and Criminal Justice Task Force, *Final Report*, 3 (Dec. 2013) (hereafter “Final Report”).²

After the amendments to Section 47-7-37 went in effect, the Circuit Court of Wayne County concluded that Appellant Jerry Wayne Atwood had committed the first “technical violation” of the conditions of his post-release supervision by failing to complete a Restitution Center program. Rather than imposing a period of imprisonment within the range authorized by statute, the Circuit Court held that the amendments to Section 47-7-37 were unconstitutional pursuant to Article 1, Sections 1 and 2 of the Mississippi Constitution and ordered that Mr. Atwood be imprisoned in the Department of Corrections for a period of *nine years and eleven months*. Mr. Atwood challenged this

¹ Miss. Code Ann. § 47-7-37 (rev. 2014) is reproduced in the Appendix to this Brief as Append. 1. Two other statutes that this Court may wish to review, Miss. Code Ann. §§ 47-7-34 (rev. 2014) & 99-19-29, are also reproduced in the Appendix as Append. 2 and Append. 3 respectively.

² The Final Report is reproduced in the Appendix to this Brief as Append. 4. It is also available at http://www.legislature.ms.gov/Documents/MSTaskForce_FinalReport.pdf. See also *id.* at 3 (“[T]he vast majority of offenders revoked to prison were not admitted for engaging in new criminal activity but rather for failing to comply with the terms of their supervision sentence. These revocations are called ‘technical revocations’ and include conduct like missing drug tests or failing to report to probation officers.”).

penalty through a motion for post-conviction relief, which was denied by the Circuit Court. He remains imprisoned and now appeals to this Court

Relevant Facts and Procedural History

On January 15, 2014, the Circuit Court of Wayne County accepted Jerry Wayne Atwood's guilty plea to one count of Grand Larceny, in violation of Miss. Code Ann. § 97-17-41, and sentenced him as follows:

[T]he Defendant is sentenced to serve a term of TEN (10) years in the custody of the Mississippi Department of Corrections with nine (9) years eleven (11) months suspended, one (1) month to serve initially and FIVE (5) years POST-RELEASE SUPERVISION under Section 47-7-34, Mississippi Code of 1972, under the supervision of the Mississippi Department of Corrections. After the Defendant has completed the service of thirty (30) days in the custody of the Mississippi Department of Corrections and is honorably discharged therefrom, the Defendant is remanded to the supervision of the staff of the Mississippi Department of Corrections ('Field Officer') to serve the post-release supervision portion of his sentence.

R.E. 5 at 128.³ The Court also ordered Mr. Atwood to comply with a number of conditions while serving the term of post-release supervision. *See id.* at 128-130. Among these conditions is a requirement that Mr. Atwood pay \$3,682.00 in restitution, costs and fees. *See id.* at 129. The Court ordered that "[t]his shall be paid through successful completion of the Restitution Center Program." *Id.* Another condition, Condition B, states that "[t]he Defendant shall obey all orders of the Court and the Field Officer." *Id.* at 128. The Court's written order also warns that "[f]ailure to abide by any

³ In this Brief, citations to the Appellant's Record Excerpts are to "R.E." followed by the record excerpt number followed by the page number(s) provided by the Circuit Court Clerk in the bottom right-hand corner of the document(s).

one of these conditions is sufficient to revoke the post-release supervision portion of this order.” *Id.*

On May 7, 2014, a Department of Corrections Field Officer filed a petition recommending that the Circuit Court revoke Mr. Atwood’s term of post-release supervision because he had allegedly violated Condition B. *See* R.E. 4 at 134. Specifically, the petition alleged that “on or about 4/15/2014 the defendant was ejected from the Hinds County Restitution Center without successful completion.” *Id.* This was the only allegation contained in the petition. *See id.* Moreover, this was the first time that such a petition had been filed in Mr. Atwood’s case. *See* Crim. Dkt., C.P. at 93.⁴

On July 2, 2014, the Circuit Court held a hearing on the petition for revocation. “[A]fter considering the testimony and evidence presented [at the hearing],” the Circuit Court concluded “that Mr. Atwood has violated condition B; in that, he failed to complete the restitution center, and he was kicked out for good cause.” Tr. 46:20-24.⁵ The Circuit Court subsequently revoked Mr. Atwood’s term of post-release supervision and ordered, among other things, that “the Defendant is sentenced to serve a term of NINE (9) YEARS AND ELEVEN (11) MONTHS in the custody of the Mississippi Department of Corrections[.]” R.E. 3 at 138.

At one time, the statute which governs the revocation of post-release supervision – Miss. Code Ann. § 47-7-37 – authorized a Circuit Court to penalize a violation of a

⁴ In this Brief, citations to the Clerk’s Papers (volume 1 of the record) are to “C.P.” followed by the page number(s) provided by the Circuit Court Clerk in the bottom right-hand corner of the document(s).

⁵ In this Brief, citations to the Transcripts (volume 2 of the record) are to “Tr.” followed by the page and line number(s).

condition of post-release supervision by “revok[ing] all or part of the probation or the suspension of sentence, and ... caus[ing] the sentence imposed to be executed or ... impos[ing] any part of the sentence which might have been imposed at the time of conviction.” *See* Miss. Code Ann. § 47-7-37 (rev. 2006). However, during the 2014 legislative session, the Legislature exercised its authority to amend the statutorily authorized penalties for violations of post-release supervision. The amendments – which were implemented through House Bill 585 – became effective on July 1, 2014, the day before Mr. Atwood’s revocation hearing.

As amended by the Legislature, the relevant provision of Section 47-7-37 states that “[i]f the court revokes probation for a technical violation, the court *shall* impose a period of imprisonment to be served in either a technical violation center or a restitution center *not to exceed ninety (90) days* for the first technical violation[.]” Miss. Code Ann. § 47-7-37(5)(a) (rev. 2014) (emphasis added). The Legislature defined “technical violation” to mean “an act or omission by the probationer that violates a condition or conditions of probation placed on the probationer by the court or the probation officer.” Miss. Code Ann. § 47-7-2(q). Furthermore the Legislature provided for the creation of “technical violation centers” which “shall be equipped to address the underlying factors that led to the offender’s violation[.]” Miss. Code Ann. § 47-7-38.1(3).

The violation for which the Court revoked Mr. Atwood’s term of post-release supervision was the first and only adjudicated violation of the conditions of his supervision and it was a technical violation. Thus, the maximum statutory penalty at the

time of revocation was “ninety (90) days” imprisonment “in either a technical violation center or a restitution center.” Miss. Code Ann. § 47-7-37(5)(a) (rev. 2014).

The Circuit Court was aware that the Legislature had amended the statutorily authorized penalties for violations of post-release supervision through House Bill 585, and was also aware that those amendments were effective prior to Mr. Atwood’s revocation hearing. *See, e.g.*, R.E. 2 at 75-76. Nonetheless, the Circuit Court took the position that it had the authority to order Mr. Atwood to serve nine (9) years and eleven (11) months in prison upon the revocation of his post-release supervision. The Circuit Court explained as follows in its written order:

The Court ... finds that any provision of House Bill 585 enacted by the legislature of this State with an effective date of July 1, 2014, which provision purports to restrict the inherent power of this Court to enforce its own orders by limiting the sentence available upon a finding of a violation of said orders and the conditions for suspension of all or part of any sentence, is unconstitutional in that such provision violates the ‘separation of powers’ doctrine as established in Article 1, Sections 1 and 2, of the Mississippi Constitution.

The Court also finds that neither a ‘technical violation center’ as established by said House Bill 585 nor a restitution center would be an appropriate placement for the defendant i[n] this cause for the reason that this revocation stems from his failure to abide by the rules of such a facility.

R.E. 2 at 75. *See also* R.E. 3 at 138.

It is worth noting that although the written order expresses the Circuit Court’s position that the Legislature violated the separation of powers doctrine when it amended the statutorily authorized penalties for violations of post-release supervision, neither the amendments to Section 47-7-37 nor the separation of powers doctrine were mentioned by

the Court, the State, or Mr. Atwood during the hearing. *See* Tr. 29:17-48:5. Indeed, the transcript of the hearing contains no indication that Mr. Atwood was informed or otherwise aware of the relevant change in the law. *See id.* Moreover, Mr. Atwood was not represented by counsel at the hearing because the Circuit Court concluded that “since he is not being charged with any new felonies [and] *this hearing does not entail any complex issues*, an attorney would not be appointed to represent him.” *Id.* at 31:15-18 (emphasis added). *See also* R.E. 2 at 74, n.2 (“At the revocation hearing, the Court found that an attorney would not be appointed by the Court because the Petitioner was not charged with any new felonies and the hearing did not entail any complex issues.”).

After the Circuit Court issued its written order, undersigned counsel learned of the Circuit Court’s holding and offered to represent Mr. Atwood *pro bono*. Counsel timely filed a motion for post-conviction relief contending that the penalty imposed upon Mr. Atwood by the Circuit Court for the first technical violation of the conditions of his post-release supervision exceeded the maximum penalty authorized by law and that the Legislature did not violate the separation of powers doctrine when it amended the penalties for such violations. *See* Mot., C.P. at 8-43. Counsel requested that the Circuit Court vacate the penalty imposed on July 2, 2014 and “either place [Mr. Atwood] back on post-release supervision or ‘impose a period of imprisonment to be served in either a technical violation center or a restitution center not to exceed ninety (90) days[.]’” *Id.* at 9 (quoting Miss. Code Ann. § 47-7-37(5)(a)).

On January 21, 2015, the Circuit Court issued a Memorandum Opinion denying Mr. Atwood’s request for post-conviction relief. *See* R.E. 2. The Circuit Court

acknowledged that the amendments to the penalty provisions of Section 47-7-37 “went into effect July 1, 2014 ... and would have therefore, been effective at the time of [Mr. Atwood’s] July 2, 2014 revocation hearing.” *Id.* at 76.⁶ However, the Circuit Court maintained that its authority to penalize Mr. Atwood for a violation of the terms of his post-release supervision was not affected by those amendments because “[t]he discretion to enforce the suspended portion of [Mr. Atwood’s] sentence, or not, is vested only in the sentencing Court, not in the legislature.” *Id.* at 84. Thus, the Circuit Court took the position – as it had at the time of revocation – that the amendments to Section 47-7-37 violated the separation of powers doctrine and were therefore unconstitutional. *See id.* Alternatively, the Circuit Court maintained that another statute, Miss. Code Ann. § 99-19-29, independently authorized the Court to revoke Mr. Atwood’s term of post-release supervision and impose a period of imprisonment. *Id.* at 86. Mr. Atwood timely appealed to this Court.

SUMMARY OF THE ARGUMENT

The period of imprisonment imposed on Mr. Atwood following the first “technical violation” of his post-release supervision exceeds the maximum penalty authorized by Miss. Code Ann. § 47-7-37 and therefore must be vacated. The Legislature’s 2014 amendments to the statutorily authorized penalties for certain violations of post-release supervision did not violate the separation of powers doctrine. The amendments do not

⁶ The Circuit Court also recognized that “because this case involves a challenge to a newly amended statute and potentially a constitutional question of the legality of the sentence imposed by th[e] Court, [Mr. Atwood] ha[d] standing to bring his motion under the Post-Conviction Collateral Relief Act, Miss. Code Ann. § 99-39-1 *et seq.*, and [that his claim was] properly before th[e] Court[.]” R.E. 2 at 77. Of course, the only “challenge” to the “newly amended statute” was raised by the Circuit Court, not by Mr. Atwood.

impinge upon any inherent power of the Circuit Court, nor do they interfere with the Circuit Court's ability to enforce its orders. Moreover, it is well-established that the Legislature has the exclusive power to define the penalties in criminal cases and to set sentencing policy for the State.

The Circuit Court's *post hoc* reliance on Miss. Code Ann. § 99-19-29 is misplaced. The post-release supervision statute, Miss. Code Ann. § 47-7-34, makes clear that revocation of post-release supervision and imposition of a period of imprisonment is governed exclusively by Miss. Code Ann. § 47-7-37.

STANDARD OF REVIEW

This case involves a circuit court's holding that, as applied to Mr. Atwood, the Legislature's 2014 amendments to Miss. Code Ann. § 47-7-37 violate the separation of powers doctrine and are therefore unconstitutional. "When addressing a statute's constitutionality, [this Court] appl[ies] a *de novo* standard of review, bearing in mind (1) the strong presumption of constitutionality; (2) the challenging party's burden to prove the statute is unconstitutional beyond a reasonable doubt; and (3) all doubts are resolved in favor of a statute's validity." *Johnson v. Sysco Food Services*, 86 So.2d 242, 243-44 (Miss. 2012) (footnotes and citations omitted). To the extent that this case involves questions of statutory interpretation, those questions are also "subject to *de novo* review." *Tipton v. State*, 150 So.3d 82, 84 (Miss. 2014).

ARGUMENT

I. The Penalty Imposed On Mr. Atwood Is Unlawful Because It Exceeds The Maximum Period Of Imprisonment Authorized By Statute For The First Technical Violation Of A Condition Of Post-Release Supervision.

The imposition of a term of imprisonment is illegal and must be vacated if it exceeds the maximum penalty prescribed by statute. *See, e.g., Foreman v. State*, 51 So.3d 957, 962 (Miss. 2011). A circuit court's authority to revoke a term of post-release supervision, and to impose a period of imprisonment upon revocation, is governed by Miss. Code Ann. § 47-7-37.⁷ At the time that the Circuit Court revoked Mr. Atwood's term of post-release supervision the statute stated, in pertinent part, that:

If the court revokes probation for a technical violation, the court shall impose a period of imprisonment to be served in either a technical violation center or a restitution center not to exceed ninety (90) days for the first technical violation and not to exceed one hundred twenty (120) days for the second technical violation. For the third technical violation, the court may impose a period of imprisonment to be served in either a technical violation center or a restitution center for up to one hundred eighty (180) days or the court may impose the remainder of the suspended portion of the sentence. For the fourth and any subsequent technical violation, the court may impose up to the remainder of the suspended portion of the sentence.

Miss. Code Ann. § 47-7-37(5)(a) (rev. 2014). The Circuit Court revoked Mr. Atwood's term of post-release supervision for "the first technical violation" of a condition of his supervision. Thus, the maximum "period of imprisonment" authorized by law was "ninety (90) days" in "either a technical violation center or a restitution center[.]" The

⁷ *See* Miss. Code Ann. § 47-7-34(2) ("Procedures for termination [of post-release supervision] and recommitment shall be conducted in the same manner as procedures for the revocation of probation and imposition of a suspended sentence as required pursuant to Section 47-7-37."); Miss. Code Ann. § 47-7-37(9) ("The arrest, revocation and recommitment procedures of this section also apply to persons who are serving a period of post-release supervision imposed by the court.").

“period of imprisonment” that was actually imposed by the Court exceeds the statutory maximum by approximately nine (9) years and eight (8) months.

At one time, Section 47-7-37 authorized a Circuit Court to punish a violation of the conditions of post-release supervision by “impos[ing] any part of the sentence which might have been imposed at the time of the conviction.” Miss. Code Ann. § 47-7-37 (rev. 2006). However, as the Circuit Court acknowledged, the Legislature amended Section 47-7-37 through House Bill 585 and those amendments became effective *before* Mr. Atwood’s revocation hearing. *See, e.g.,* R.E. 2 at 75-76. As amended, the statute provides for graduated and *lesser* penalties for “technical violation[s].” Miss. Code Ann. § 47-7-37(5)(a) (rev. 2014). The amended statute does not authorize the Circuit Court to impose the “remainder of the suspended portion of the sentence” until a “third technical violation” has been committed. *Id.*

This Court has held “that when a statute is amended to provide for a lesser penalty, and the amendment takes effect before sentencing, the trial court *must* sentence according to the statute as amended.” *Daniels v. State*, 742 So.2d 1140, 1145 (Miss. 1999) (emphasis added). *See also USPCI of Mississippi, Inc. v. State ex rel. McGowan*, 688 So.2d 783, 786-87 (Miss. 1997) (emphasis added) (“An amended act is ordinarily construed as if the original statute had been repealed, and *as far as any action after the adoption of the amendment is concerned*, as if the statute had been originally enacted in its amended form.”); *State ex rel. Pitman v. Ladner*, 512 So.2d 1271, 1276 (Miss. 1987) (“[A] repealed or amended statute will ordinarily not be enforced against an individual where he regards it as less favorable to him.”). Thus, the Circuit Court should have

penalized Mr. Atwood “...according to the statute as amended.” *Daniels*, 742 So.2d at 1145.

II. The Legislature’s Amendments To The Statutorily Authorized Penalties For Certain Violations Of Post-Release Supervision Are Not Unconstitutional.

The Circuit Court concluded that the amendments to the penalty provisions of Section 47-7-37 “purport[] to restrict the inherent power of th[e] Court to enforce its own orders by limiting the sentence available upon a finding of a violation of said orders and the conditions for suspension of all or part of any sentence” and thus are “unconstitutional in that ... [they] violate[] the ‘separation of powers’ doctrine as established in Article 1, Sections 1 and 2 of the Mississippi Constitution.” R.E. 2 at 75. *See also id.* at 83-86. It is unclear whether the Circuit Court held that the separation of powers doctrine prohibits application of the amendments to cases like Mr. Atwood’s – where the court had imposed a period of post-release supervision *before* the amendments went into effect – or if the court held that the amendments cannot be applied even to those cases where the defendant is sentenced to post-release supervision *after* the amendments went into effect (i.e. that the separation of powers doctrine bars the Legislature from *ever* amending the penalty provisions of Section 47-7-37). Regardless, the Legislature’s amendments to Section 47-7-37 do not impinge upon any “inherent power” of the Circuit Court, interfere with the Circuit Court’s ability to “enforce” an order, or otherwise violate the separation of powers doctrine. Rather, the Legislature – which authorized circuit courts to impose terms of post-release supervision in the first place – made a well-reasoned and lawful policy decision to alter the statutorily-

authorized penalties for certain violations of the conditions of supervision in an effort to promote safety and reduce corrections costs. It has long been established that “the fixing of punishment in criminal cases is a question of *legislative* policy.” *Washington v. State*, 478 So.2d 1028, 1031 (Miss. 1985) (citations omitted, emphasis added).

As an initial matter, it is worthwhile to reiterate the substance of the Circuit Court’s January 15, 2014 sentencing order. *See* R.E. 5. In that order, the Circuit Court sentenced Mr. Atwood to a term of imprisonment to be followed by a term of post-release supervision. *Id.* With respect to the term of post-release supervision, the Court ordered Mr. Atwood to “comply with [a list of] conditions” and warned him that “[f]ailure to abide by any one of these conditions is sufficient to revoke the post-release supervision portion of this order.” *Id.* at 128.

The Legislature’s amendments to Section 47-7-37 did *not* alter or amend the sentence imposed by the Circuit Court. On July 1, 2014 – the day the amendments took effect – Mr. Atwood remained “sentenced to serve a term of TEN (10) years in the custody of the Mississippi Department of Corrections with nine (9) years eleven (11) months suspended, one (1) month to serve ... and FIVE (5) years POST-RELEASE SUPERVISION.” R.E. 5 at 128. Moreover, nothing in House Bill 585 altered or amended the conditions of post-release supervision that the Circuit Court imposed on Mr. Atwood in the January 15, 2014 sentencing order.

Furthermore, the Legislature’s amendments to Section 47-7-37 did *not* interfere with the Circuit Court’s power to enforce its order. The amendments did not deprive the Circuit Court of the sole authority to determine whether Mr. Atwood had violated a

condition of his post-release supervision, nor did they strip the Circuit Court of the exclusive power to revoke Mr. Atwood's term of supervision and impose a period of imprisonment. Significantly, the Circuit Court retains full authority to "impose up to the remainder of the suspended portion of the sentence" if Mr. Atwood continues to violate the conditions of his post-release supervision. Miss. Code Ann. § 47-7-37(5)(a) ("For the fourth and any subsequent technical violation, the court may impose up to the remainder of the suspended portion of the sentence.").

Although the Circuit Court is correct that the "'judicial power' in Section 144 of the Constitution includes the power to make rules of practice and procedure, not inconsistent with the Constitution," R.E. 2 at 85 (citing *S. Pac. Lumber Co., Inc. v. Reynolds*, 206 So.2d 334, 335 (Miss. 1968)), the amendments to Section 47-7-37 at issue in this case have nothing to do with procedure.⁸ Instead, the relevant amendments address the *substantive* penalty (i.e. "period of imprisonment") that may be imposed when a term of post-release supervision is revoked for certain types of violations of the conditions of supervision (i.e. "technical violations"). Mississippi law has long recognized that the power to define the penalties in a criminal case is a legislative, not judicial, function. Indeed, this Court has repeatedly held that "'defining crimes and *prescribing punishments* are *exclusively legislative functions* as a matter of constitutional law.'" *Parker v. State*, 119 So.3d 987, 998 (Miss. 2013) (quoting *Williams v. State*, 708 So.2d 1358, 1361 (Miss. 1998)) (emphasis added). *See also Fisher v. State*, 690 So.2d 268, 275 (Miss. 1996)

⁸ "Procedure is defined as '[t]he mode of proceeding by which a legal right is enforced, as distinguished from the substantive law which gives or defines the rights, and which, by means of the proceedings, the court is to administer; the machinery, as distinguished from its product.'" *Jones v. City of Ridgeland*, 48 So.3d 530, 537 (Miss. 2010) (citing *Black's Law Dictionary* 1203-04 (6th ed. 1990)).

(emphasis added) (“[T]he legislature has *complete control* over sentencing, including judicial discretion in sentencing.”). As noted above, this Court has also recognized that the Legislature has the authority to modify the available penalties in a criminal case even *after* the Court has jurisdiction over a defendant. *See Daniels*, 742 So.2d at 1140 (“[W]hen a statute is amended before sentencing and provides for a lesser penalty, the lesser penalty must be imposed.”).

There is no reason to believe that the Legislature’s power to modify the authorized penalties for violations of post-release supervision is any different from, or lesser than, its power to modify the penalties for crimes. Our circuit courts do not have “inherent power” to suspend a sentence or to impose a term of post-release supervision as punishment for a crime, nor do they have “inherent power” to revoke a term of post-release supervision and impose a period of imprisonment. The power to “suspend” a period of imprisonment by imposing a term of post-release supervision (a penalty for a crime) was granted and defined by the Legislature through Miss. Code. Ann. § 47-7-34. *See, e.g., Johnson v. State*, 925 So.2d 86, 103 (Miss. 2006) (emphasis added) (“[T]he circuit and county courts of this state have the power to suspend, in whole or in part, a convicted felon’s sentence ... inasmuch as this Court and the legislature have *empowered them* to do so under Miss. Code Ann. [§] 47-7-34[.]”); *Miller v. State*, 875 So.2d 194, 199 (Miss. 2004) (noting that “post-release supervision” is a “statutory creature[.]”); *Carter v. State*, 754 So.2d 1207, 1208 (Miss. 2000) (“Miss. Code Ann. § 47-7-34 created the post-release supervision program[.] ... Post-release supervision is a legislative creation[.]”). Moreover, the power to revoke a previously imposed term of post-release supervision and

impose a period of imprisonment (a penalty for a violation of one or more conditions of supervision) was granted and defined by the Legislature through Section 47-7-37. *See, e.g., Moore v. State*, 585 So.2d 738, 741 (Miss. 1991) (emphasis added) (“Miss. Code Ann. § 47-7-37 grants to the circuit ... courts the authority to revoke probation.”). This Court and the Court of Appeals have interpreted and applied Section 47-7-37 many times and never suggested that the Legislature lacked the authority to define the range of imprisonment that may be imposed at the time of revocation of a term of post-release supervision. If the Legislature had the power to enact Section 47-7-37 and define the range of imprisonment that may be imposed at the time of revocation, surely it also has the power to *amend* the statute and the range of authorized penalties.

Indeed, to the extent that the Circuit Court held that the separation of powers doctrine bars the Legislature from *ever* amending the penalty provisions of Section 47-7-37, several questions arise: If the Legislature cannot amend its own statute to impose statewide changes to the penalties for violations of post-release supervision, who can? Is this the type of decision that should be made by a majority vote of the justices of this Court or a majority vote of the legislature? As noted above, this Court has enacted rules of procedure, but we are aware of no rule that it has imposed that would alter the length of time that a person may be ordered to serve in prison. On the other hand, the Legislature routinely makes and amends such rules.

To be sure, “a ... statute that required ... courts to reopen final judgments that had been entered before the statute’s enactment [would be] unconstitutional on separation of powers grounds.” *Miller v. French*, 530 U.S. 327, 343 (2000) (citation omitted). But that

is not what happened here. While the Circuit Court’s January 15, 2015 sentencing order was a “‘final judgment’ for the purposes of appeal,” it was “not the ‘last word of the judicial department.’” *Id.* at 347 (citation omitted). Like an order which includes the “provision of prospective relief,” the order sentencing Mr. Atwood to a term of post-release supervision (with the possibility of revocation at some later date should the Court find that he violated a condition of supervision) was “subject to the continuing supervisory jurisdiction of the court and *therefore [could] be altered according to subsequent changes in the law.*” *Id.* (emphasis added).

Imagine, for example, that on January 15, 2014 the Circuit Court had ordered Mr. Atwood to serve a term of post-release supervision and, rather than sending him to a restitution center at the outset, had ordered that if he willfully failed to make timely restitution payments his post-release supervision would be revoked and he would be sent to a restitution center *or* imprisoned. Now further imagine that during the 2014 session the Legislature had decided to abolish restitution centers effective July 1, 2014. If the Circuit Court then revoked Mr. Atwood’s post-release supervision on July 2, 2014, it would be unable to send him to a restitution center because no such facility would exist. It would make little sense to claim that the Legislature’s decision to abolish restitution centers violated the separation of powers doctrine, even though it limited the Court’s discretion on July 2, 2014 (and even though a prior court order stated that placement in such a facility was a possible consequence for violating the conditions of supervision). Likewise, the Legislature’s decision to amend the period of imprisonment that may be imposed for a first “technical violation” of supervision does not violate the constitution,

even though it similarly places some limits on the Court’s discretion at the time of revocation.

It is also important to note that the legislative history of the decision to amend Section 47-7-37 demonstrates that it was a well-reasoned exercise of the recognized legislative power to set sentencing (and spending) policy for the state. As noted above, the amendments were specifically recommended to the Legislature by its “bipartisan, inter-branch Corrections and Criminal Justice Task (Task Force).” Final Report at 3.⁹ In 2013, the Legislature charged the Task Force “with developing policies that improve public safety, ensure clarity in sentencing, and control corrections costs.” *Id.* To this end, the Task Force spent months “analyz[ing] the state’s corrections and criminal justice systems, including an exhaustive review of sentencing, corrections, and community supervision data.” *Id.*

Among other things, the Task Force discovered “that many offenders enter prison [in Mississippi] not because of a new criminal sentence but because of a revocation from community supervision.” Final Report at 9 (footnote omitted). As explained in the Task Force’s Final Report to the Legislature:

Prison admissions for revocations increased 84 percent from FY2002 to FY2012. In fact, FY2012 was the first time more offenders entered prison from a revocation from supervision (5,481) than from a new criminal sentence (4,973). ... High admissions compounded with long lengths of prison stay have resulted in a standing prison population that is over one-third (38 percent) revocations.

Moreover, the vast majority of offenders revoked to prison were not admitted for engaging in new criminal activity but rather for failing to

⁹ Attached as Append. 4.

comply with the terms of their supervision sentence. These revocations are called ‘technical revocations’ and include conduct like missing drug tests of failing to report to probation officers. In FY2012, 75 percent of the offenders entering prison on a revocation of probation were revoked on a technical violation.

Id. Thus, incarceration for technical violations of supervision was significantly contributing to Mississippi’s growing inmate population. “Absent policy change[s], ... [t]his growth [was] estimated to cost the state an additional \$266 million over the next 10 years.” *Id.* at 3 (emphasis added).

The Task Force also reviewed studies that showed that incarcerating technical violators for long periods of time is not only expensive, but counter-productive, especially when the offender (like Mr. Atwood) was initially placed on probation or post-release supervision due to a conviction for a nonviolent offense. Although the Task Force recognized that “[p]risons can enhance public safety both by keeping offenders off of the streets (incapacitating them from committing further crime), and by deterring future criminal behavior,” it also “reviewed research that shows prison can have the opposite effect for certain offenders, bringing them into closer contact with each other while removing them from positive community and family influences.” *Id.* at 7-8. According to the Task Force, “[a] growing consensus among researchers around the ‘schools of crime’ theory suggests that for many low risk, nonviolent offenders the negative impacts outweigh the positive; that is, sending offenders to prison can cause them to commit more crime when they get out rather than less.” *Id.* at 8 (footnote omitted).

With the above in mind, the Task Force offered the following recommendations to the Legislature:

To (1) ensure that lower-level probationers and parolees are not mixed in with the general prison population, (2) target factors driving offender misconduct, such as addiction, and (3) provide an effective and proportional response to noncriminal violations:

- a. Re-designate existing MDOC facilities as specialized technical violation centers (TVCs) with a corresponding sanctioning structure for technical revocations of supervision. Judges (for probation) and the Parole Board (for parole) will retain supervision authority and will be able impose periods of imprisonment for parole or probation violations under the following graduated structure:
 - i. Up to 90 days in a TVC for the first revocation.
 - ii. Up to 120 days in a TVC for the second revocation.
 - iii. A judge or the Parole Board may opt to impose either up to 180 days in a TVC or up to the full remaining term in prison for the third revocation.
 - iv. A judge or the Parole Board may impose up to the full remaining term in prison for the fourth and subsequent revocations.
- b. The revocation term imposed in a TVC may not be reduced and the violator will serve the full term imposed.
- c. TVCs will be specially equipped to address those underlying factors leading to offender violations, including substance abuse, and other needs identified by a validated risk and needs assessment as a necessary component of the person's recidivism reduction plan.

Final Report at 17. These recommendations were adopted by the Legislature and led to the amendments to Section 47-7-37 that are at issue in this appeal, as well as the creation of technical violation centers. *See* Miss. Code Ann. § 47-7-38.1(1).

Of course, neither the Circuit Court nor this Court is equipped to hold the sort of hearings and conduct the detailed budgetary and public policy research that led to the Task Force's recommendations and the Legislature's implementation of them. The Legislature is clearly in a better position than the courts to make those decisions, which is exactly why our system of government accords the legislative branch the power and responsibility to establish and amend the state's sentencing policies.

In sum, the Legislature exercised its well-established power to prescribe the penalties in criminal cases after conducting exactly the sort of policy evaluations and investigations that we expect of our elected law-makers. The Legislature had the lawful authority to create the sentencing option of post-release supervision in the first instance, and it has the lawful authority to establish and modify the penalties for violations of the conditions of post-release supervision. The relevant amendments did not impinge upon any inherent power of the Circuit Court, nor did they unconstitutionally interfere with the Circuit Court's authority to enforce an order.

III. Section 99-19-29 Does Not Authorize A Circuit Court To Impose Or Revoke A Term of Post-Release Supervision And Thus Is Not Relevant To This Case.

Alternatively, the Circuit Court sought to justify the penalty imposed on Mr. Atwood by relying on Miss. Code Ann. § 99-19-29, which grants courts authority to “annul and vacate” a suspended sentence and require a defendant “to serve the full term of the original sentence that has not been served.” *See* R.E. 2 at 86. But that statute is not applicable to Mr. Atwood. The Circuit Court's authority to revoke Mr. Atwood's term of post-release supervision and impose a period of imprisonment is governed

exclusively by the provisions of Miss. Code Ann. § 47-7-37. Section 47-7-34, which grants courts the authority to impose a term of post-release supervision as punishment “upon a conviction for a felony,” clearly states that “[p]rocedures for termination and recommitment shall be conducted in the same manner as procedures for the revocation of probation and imposition of a suspended sentence as required *pursuant to Section 47-7-37.*” Miss. Code Ann. §§ 47-7-34(1) & (3) (emphasis added).

The Circuit Court appears to believe that it had the power to impose a “suspended sentence” in this case that is somehow independent of Section 47-7-34. But only the “Probation Act” authorizes a court to “suspend felony sentences.” *Johnson v. State*, 925 So.2d 86, 96 (2006). *See also id.* (citation omitted) (“‘Before 1956 the circuit and county courts had no statutory authority to suspend sentences in felony cases.’”). One method by which a court may, in effect, “suspend” a felony sentence is by imposing a term of post-release supervision pursuant to Section 47-7-34. *See generally Johnson*, 925 So.2d 86. That was the method employed by the Circuit Court in this case.

The Circuit Court’s January 15 sentencing order clearly states that Mr. Atwood was sentenced to serve a term of “POST-RELEASE SUPERVISION *under Section 47-7-34, Mississippi Code of 1972.*” R.E. 5 at 128 (emphasis added). Furthermore, the Circuit Court’s July 2, 2014 Order committing Mr. Atwood to the custody of the Department of Corrections is styled as an “ORDER OF REVOCATION OF POST-RELEASE SUPERVISION” and states the Court’s finding that Mr. Atwood had “violated the terms and conditions of his post-release supervision.” R.E. 3 at 138. The Circuit Court also clearly ordered “that the post-release supervision of the Defendant in this cause is hereby

revoked and the Defendant is sentenced to serve a term of NINE (9) YEARS AND ELEVEN (11) MONTHS in the custody of the Mississippi Department of Corrections[.]” *Id.* Thus, Section 99-19-29 did not, and could not, come into play. *See Gilmer v. State*, 955 So.2d 829, 833 (Miss. 2007) (citation omitted, emphasis added) (“The court may not *enlarge or restrict* a statute where the meaning of the statute is clear.”).

Moreover, “the ‘Golden Rule’ of statutory interpretation is the avoidance of absurdity.” *Clark v. State*, 858 So.2d 882, 884 (Miss. Ct. App. 2003) (citation omitted). Interpreting Section 99-19-29 to authorize a Circuit Court to revoke a term of post-release supervision and impose the balance of a “suspended” sentence would violate this Golden Rule by nullifying the Legislature’s decision to limit the penalties that may be imposed for certain violations of post-release supervision. Therefore, the Circuit Court’s *post hoc* reliance on Section 99-19-29 to justify its actions must be rejected.

CONCLUSION

For the foregoing reasons, this Court should conclude that the Legislature did not exceed its authority when it amended the penalties that may be imposed upon revocation of a term of post-release supervision, that Mr. Atwood should have been sentenced to no more than ninety (90) days in either a technical violation center or a restitution center, and thus that the judgment of the Circuit Court should be reversed and Mr. Atwood should be released from prison and placed back on post-release supervision.

Respectfully submitted,

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APPENDIX

MISSISSIPPI STATUTES & LEGISLATIVE HISTORY IN SUPPORT OF APPELLANT’S BRIEF

Statutes	Appendix No.
Miss. Code Ann. § 47-7-37 (rev. 2014).....	1
Miss. Code Ann. § 47-7-34 (rev. 2014).....	2
Miss. Code Ann. § 99-19-29	3
Legislative History	
Final Report of the Task Force	4

Append. 1

Miss. Code Ann. § 47-7-37 (rev. 2014)

West's Annotated Mississippi Code

Title 47. Prisons and Prisoners; Probation and Parole

Chapter 7. Probation and Parole

Probation and Parole Law

Miss. Code Ann. § 47-7-37

§ 47-7-37. Probation and post-release supervision violations; release with or without bail; procedure; duration

Currentness

(1) The period of probation shall be fixed by the court, and may at any time be extended or terminated by the court, or judge in vacation. Such period with any extension thereof shall not exceed five (5) years, except that in cases of desertion and/or failure to support minor children, the period of probation may be fixed and/or extended by the court for so long as the duty to support such minor children exists. The time served on probation or post-release supervision may be reduced pursuant to Section 55 of this act.

(2) At any time during the period of probation, the court, or judge in vacation, may issue a warrant for violating any of the conditions of probation or suspension of sentence and cause the probationer to be arrested. Any probation and parole officer may arrest a probationer without a warrant, or may deputize any other officer with power of arrest to do so by giving him a written statement setting forth that the probationer has, in the judgment of the probation and parole officer, violated the conditions of probation. Such written statement delivered with the probationer by the arresting officer to the official in charge of a county jail or other place of detention shall be sufficient warrant for the detention of the probationer.

(3) Whenever an offender is arrested on a warrant for an alleged violation of probation as herein provided, the department shall hold an informal preliminary hearing within seventy-two (72) hours of the arrest to determine whether there is reasonable cause to believe the person has violated a condition of probation. A preliminary hearing shall not be required when the offender is not under arrest on a warrant or the offender signed a waiver of a preliminary hearing. The preliminary hearing may be conducted electronically. If reasonable cause is found, the offender may be confined no more than twenty-one (21) days from the admission to detention until a revocation hearing is held. If the revocation hearing is not held within twenty-one (21) days, the probationer shall be released from custody and returned to probation status.

(4) If a probationer or offender is subject to registration as a sex offender, the court must make a finding that the probationer or offender is not a danger to the public prior to release with or without bail. In determining the danger posed by the release of the offender or probationer, the court may consider the nature and circumstances of the violation and any new offenses charged; the offender or probationer's past and present conduct, including convictions of crimes and any record of arrests without conviction for crimes involving violence or sex crimes; any other evidence of allegations of unlawful sexual conduct or the use of violence by the offender or probationer; the offender or probationer's family ties, length of residence in the community, employment history and mental condition; the offender or probationer's history and conduct during the probation or other supervised release and any other previous supervisions, including disciplinary records of previous incarcerations; the likelihood that the offender or probationer will engage again in a criminal course of conduct; the weight of the evidence against the offender or probationer; and any other facts the court considers relevant.

(5)(a) The probation and parole officer after making an arrest shall present to the detaining authorities a similar statement of the circumstances of violation. The probation and parole officer shall at once notify the court of the arrest and detention of the probationer and shall submit a report in writing showing in what manner the probationer has violated the conditions of probation. Within twenty-one (21) days of arrest and detention by warrant as herein provided, the court shall cause the probationer to be brought before it and may continue or revoke all or any part of the probation or the suspension of sentence. If the court revokes probation for a technical violation, the court shall impose a period of imprisonment to be served in either a technical violation center or a restitution center not to exceed ninety (90) days for the first technical violation and not to exceed one hundred twenty (120) days for the second technical violation. For the third technical violation, the court may impose a period of imprisonment to be served in either a technical violation center or a restitution center for up to one hundred eighty (180) days or the court may impose the remainder of the suspended portion of the sentence. For the fourth and any subsequent technical violation, the court may impose up to the remainder of the suspended portion of the sentence. The period of imprisonment in a technical violation center imposed under this section shall not be reduced in any manner.

(b) If the offender is not detained as a result of the warrant, the court shall cause the probationer to be brought before it within a reasonable time and may continue or revoke all or any part of the probation or the suspension of sentence, and may cause the sentence imposed to be executed or may impose any part of the sentence which might have been imposed at the time of conviction. If the court revokes probation for a technical violation, the court shall impose a period of imprisonment to be served in either a technical violation center or a restitution center not to exceed ninety (90) days for the first technical violation and not to exceed one hundred twenty (120) days for the second technical violation. For the third technical violation, the court may impose a period of imprisonment to be served in either a technical violation center or a restitution center for up to one hundred eighty (180) days or the court may impose the remainder of the suspended portion of the sentence. For the fourth and any subsequent technical violation, the court may impose up to the remainder of the suspended portion of the sentence. The period of imprisonment in a technical violation center imposed under this section shall not be reduced in any manner.

(c) If the court does not hold a hearing or does not take action on the violation within the twenty-one-day period, the offender shall be released from detention and shall return to probation status. The court may subsequently hold a hearing and may revoke probation or may continue probation and modify the terms and conditions of probation. If the court revokes probation for a technical violation, the court shall impose a period of imprisonment to be served in either a technical violation center operated by the department or a restitution center not to exceed ninety (90) days for the first technical violation and not to exceed one hundred twenty (120) days for the second technical violation. For the third technical violation, the court may impose a period of imprisonment to be served in either a technical violation center or a restitution center for up to one hundred and eighty (180) days or the court may impose the remainder of the suspended portion of the sentence. For the fourth and any subsequent technical violation, the court may impose up to the remainder of the suspended portion of the sentence. The period of imprisonment in a technical violation center imposed under this section shall not be reduced in any manner.

(d) For an offender charged with a technical violation who has not been detained awaiting the revocation hearing, the court may hold a hearing within a reasonable time. The court may revoke probation or may continue probation and modify the terms and conditions of probation. If the court revokes probation for a technical violation the court shall impose a period of imprisonment to be served in either a technical violation center operated by the department or a restitution center not to exceed ninety (90) days for the first technical violation and not to exceed one hundred twenty (120) days for the second technical violation. For the third technical violation, the court may impose a period of imprisonment to be served in either a technical violation center or a restitution center for up to one hundred eighty (180) days or the court may impose the remainder of the suspended portion of the sentence. For the fourth and any subsequent technical violation, the court may impose up to

the remainder of the suspended portion of the sentence. The period of imprisonment in a technical violation center imposed under this section shall not be reduced in any manner.

(6) If the probationer is arrested in a circuit court district in the State of Mississippi other than that in which he was convicted, the probation and parole officer, upon the written request of the sentencing judge, shall furnish to the circuit court or the county court of the county in which the arrest is made, or to the judge of such court, a report concerning the probationer, and such court or the judge in vacation shall have authority, after a hearing, to continue or revoke all or any part of probation or all or any part of the suspension of sentence, and may in case of revocation proceed to deal with the case as if there had been no probation. In such case, the clerk of the court in which the order of revocation is issued shall forward a transcript of such order to the clerk of the court of original jurisdiction, and the clerk of that court shall proceed as if the order of revocation had been issued by the court of original jurisdiction. Upon the revocation of probation or suspension of sentence of any offender, such offender shall be placed in the legal custody of the State Department of Corrections and shall be subject to the requirements thereof.

(7) Any probationer who removes himself from the State of Mississippi without permission of the court placing him on probation, or the court to which jurisdiction has been transferred, shall be deemed and considered a fugitive from justice and shall be subject to extradition as now provided by law. No part of the time that one is on probation shall be considered as any part of the time that he shall be sentenced to serve.

(8) The arresting officer, except when a probation and parole officer, shall be allowed the same fees as now provided by law for arrest on warrant, and such fees shall be taxed against the probationer and paid as now provided by law.

(9) The arrest, revocation and recommitment procedures of this section also apply to persons who are serving a period of post-release supervision imposed by the court.

(10) Unless good cause for the delay is established in the record of the proceeding, the probation revocation charge shall be dismissed if the revocation hearing is not held within thirty (30) days of the warrant being issued.

(11) The Department of Corrections shall provide semiannually to the Oversight Task Force the number of warrants issued for an alleged violation of probation or post-release supervision, the average time between detention on a warrant and preliminary hearing, the average time between detention on a warrant and revocation hearing, the number of ninety-day sentences in a technical violation center issued by the court, the number of one-hundred-twenty-day sentences in a technical violation center issued by the court, the number of one-hundred-eighty-day sentences issued by the court, and the number and average length of the suspended sentences imposed by the court in response to a violation.

Credits

Laws 1956, Ch. 262, § 12; Laws 1962, Ch. 331, § 1; Laws 1981, Ch. 465, § 108; Laws 1984, Ch. 471, § 118; Laws 1986, Ch. 413, § 118; Laws 1990, Ch. 331, § 1; Laws 1992, Ch. 395, § 1; Laws 1995, Ch. 596, § 11, eff. June 30, 1995; Laws 2006, Ch. 566, § 6, eff. July 1, 2006. Amended by Laws 2014, Ch. 457 (H.B. No. 585), § 58, eff. July 1, 2014.

JUDICIAL DECISIONS

Append. 2

Miss. Code Ann. § 47-7-34 (rev. 2014)

West's Annotated Mississippi Code
Title 47. Prisons and Prisoners; Probation and Parole
Chapter 7. Probation and Parole
Probation and Parole Law

Miss. Code Ann. § 47-7-34

§ 47-7-34. Post-release supervision; imposition by court; restrictions; termination

Currentness

(1) When a court imposes a sentence upon a conviction for any felony committed after June 30, 1995, the court, in addition to any other punishment imposed if the other punishment includes a term of incarceration in a state or local correctional facility, may impose a term of post-release supervision. However, the total number of years of incarceration plus the total number of years of post-release supervision shall not exceed the maximum sentence authorized to be imposed by law for the felony committed. The defendant shall be placed under post-release supervision upon release from the term of incarceration. The period of supervision shall be established by the court.

(2) The period of post-release supervision shall be conducted in the same manner as a like period of supervised probation, including a requirement that the defendant shall abide by any terms and conditions as the court may establish. Failure to successfully abide by the terms and conditions shall be grounds to terminate the period of post-release supervision and to recommit the defendant to the correctional facility from which he was previously released. Procedures for termination and recommitment shall be conducted in the same manner as procedures for the revocation of probation and imposition of a suspended sentence as required pursuant to Section 47-7-37.

(3) Post-release supervision programs shall be operated through the probation and parole unit of the Division of Community Corrections of the department. The maximum amount of time that the Mississippi Department of Corrections may supervise an offender on the post-release supervision program is five (5) years.

Credits

Laws 1995, Ch. 596, § 9, eff. June 30, 1995. Amended by Laws 2000, Ch. 622, § 4, eff. July 1, 2000; Laws 2002, Ch. 624, § 6, eff. July 1, 2002; Laws 2014, Ch. 457 (H.B. No. 585), § 57, eff. July 1, 2014.

Notes of Decisions (74)

Miss. Code Ann. § 47-7-34, MS ST § 47-7-34

The Statutes and Constitution are current with the laws in effect through April 23, 2015.

Append. 3

Miss. Code Ann. § 99-19-29

West's Annotated Mississippi Code

Title 99. Criminal Procedure

Chapter 19. Judgment, Sentence, and Execution

in General

Miss. Code Ann. § 99-19-29

§ 99-19-29. Vacation of suspension or conditional pardon

Currentness

Whenever any court granting a suspended sentence, or the governor granting a pardon, based on conditions which the offender has violated or failed to observe, shall be convinced by proper showing, of such violation of sentence or pardon, then the governor or the judge of the court granting such suspension of sentence shall be authorized to annul and vacate such suspended sentence or conditional pardon in vacation or court time. The convicted offender shall thereafter be subject to arrest and court sentence service, as if no suspended sentence or conditional pardon had been granted, and shall be required to serve the full term of the original sentence that has not been served. The offender shall be subject, after such action by the court or the governor, to arrest and return to proper authorities as in the case with ordinary escaped prisoner.

Notes of Decisions (33)

Miss. Code Ann. § 99-19-29, MS ST § 99-19-29

The Statutes and Constitution are current with the laws in effect through April 23, 2015.

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Append. 4

Final Report of the Task Force

Final Report

December 2013



Mississippi
Corrections and Criminal Justice Task Force

Acknowledgements

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Grace Simmons Fisher
Jerry Williams

Parole Board

Steve Pickett, Chairman
Clarence Brown
Nehemiah Flowers
Betty Lou Jones
Butch Townsend

Legislative Staff

Carolyn Bailes
Patricia Trowles

Brice Wiggins, State Senator
Marshall Fisher, Director, Bureau of Narcotics
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Summary

Mississippi's prison population has grown by 17 percent in the last decade.¹ In July of this year, Mississippi prisons housed 22,600 inmates. Mississippi now has the second-highest imprisonment rate in the country, trailing only Louisiana.² Absent policy change, these trends will continue and Mississippi will need to house an additional 1,990 inmates by 2024.³ This growth is estimated to cost the state an additional \$266 million in corrections spending over the next 10 years.

In an attempt to ease escalating prison costs over the past decade, between 2008-2010, the state adopted a series of patchwork release policies that undermined clarity in sentencing, created a disconnect between the corrections and criminal justice systems, and were ultimately unsuccessful at controlling prison population and cost growth.

Seeking a comprehensive and data-driven review of the sentencing and corrections systems, the 2013 Mississippi Legislature passed, and Governor Phil Bryant signed into law, House Bill 1231 to establish the bipartisan, inter-branch Corrections and Criminal Justice Task Force (Task Force).⁴ The Task Force was charged with developing policies that improve public safety, ensure clarity in sentencing, and control corrections costs. Beginning in June 2013, the Task Force analyzed the state's corrections and criminal justice systems, including an exhaustive review of sentencing, corrections, and community supervision data. Key findings include:

- Almost three-quarters of offenders entering prison in 2012 were sentenced for a nonviolent offense.
- More offenders are now entering prison for violations of supervision than for new crimes.
- Uncertainty about how long inmates will serve behind bars has helped push up sentence lengths by 28 percent over the past decade.
- Nearly one in three nonviolent offenders return to prison within three years of release.

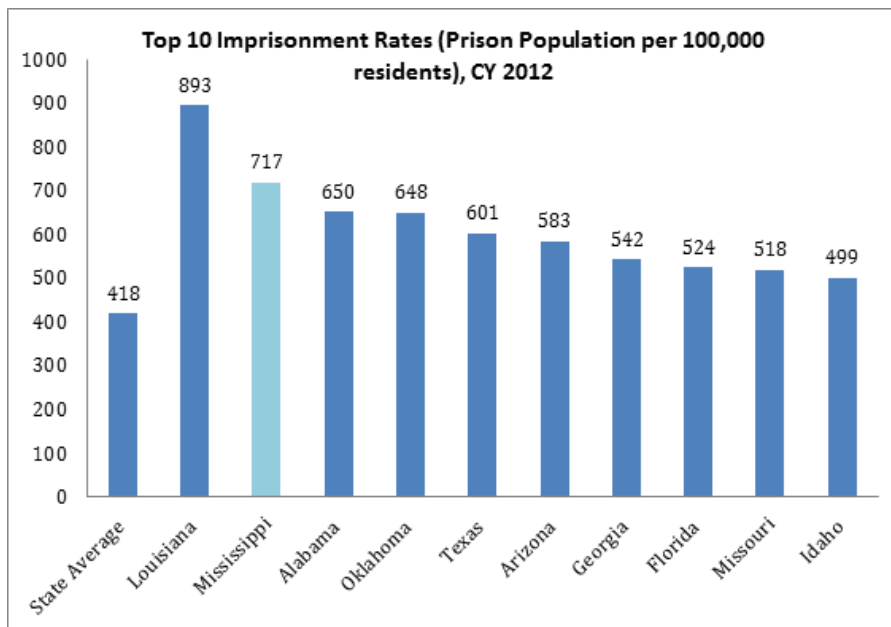
Based on the analysis, the Task Force developed a comprehensive package of policy recommendations that fulfill its mission. Taken together, the Task Force's policy recommendations are projected to halt all projected prison growth and avert at least \$266 million in corrections spending through 2024.

Members of the Corrections and Criminal Justice Task Force

Commissioner Christopher B. Epps (Chair)	Department of Corrections
Senator Willie Simmons	State Senate, District 13
Senator Sampson Jackson	State Senate, District 32
Senator Hob Bryan	State Senate, District 7
Representative Andy Gipson	House of Representatives, District 77
Representative Tommy Taylor	House of Representatives, District 28
Judge Larry Roberts	Court of Appeals
Judge Vernon R. Cotten	Eighth Circuit Court
Judge Jimmy Morton	Hinds County Justice Court
Judge Steve Ratcliff III	Madison County Court
Richard "Ricky" Smith, Jr., District Attorney	Ninth Circuit Court
Ronnie Harper, District Attorney	Sixth Circuit Court
Jamie McBride, Assistant District Attorney	Seventh Circuit Court
Onetta S. Whitley, Deputy Attorney General	Attorney General's Office
Greg Weber, Attorney	Public Defender, Madison County
Andre' de Gruy, Director	Capital Defense Council
Lance Humphreys, Sheriff	Yalobusha County
Bill Lauderdale Jr., County Supervisor	Warren County
Jody Owens II, Managing Attorney	Southern Poverty Law Center
Vicki Gilliam, Attorney	Mississippi Association for Justice
Ken Winter, Executive Director	Mississippi Association of Chiefs of Police

Challenges Facing Mississippi

Mississippi's prison population has grown by 17 percent in the last decade, nearly four times faster than the resident population.⁵ In July of this year, Mississippi prisons housed 22,600 inmates. Mississippi now has the second-highest imprisonment rate in the country, trailing only Louisiana.



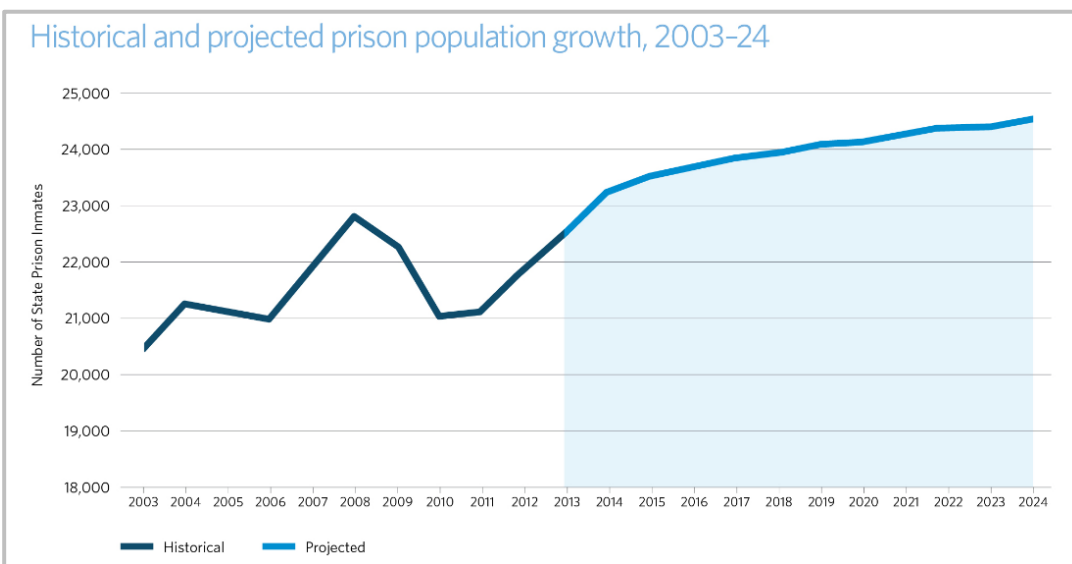
Growth in the state's prison population has come at significant taxpayer expense. Mississippi spent \$339 million on corrections in fiscal year 2013, up from \$276 million in 2003. This growth is primarily driven by prison costs.

As the prison population and costs escalated, the state legislature passed a series of earned time and release options to contain corrections costs. These policies helped reduce growth in the short term but the growth soon resumed. The policies have also made it increasingly difficult for judges, prosecutors, offenders, and victims to predict the percentage of a given sentence that will be served behind bars.

The Task Force also reviewed data that found that the state's growing prison population and increased corrections spending have failed to produce commensurate results for public safety. Under current state policies and resource allocation, nearly one in every three nonviolent offenders released from Mississippi prisons returns within three years.⁶

While the state's prison budget consumes hundreds of millions of dollars, cost-effective public safety strategies that hold offenders accountable and reduce crime are in short supply. The vast majority of corrections spending – 93 percent – pays for prisons, while the small remainder, approximately \$23 million, funds the supervision of the nearly 40,000 felony offenders on probation, parole, and house arrest.

If policies do not change, Mississippi's prison population is projected to grow by 1,990 inmates over the next decade. These added inmates will cost taxpayers an additional \$266 million in the next 10 years, including the costs of opening a previously closed facility.



Corrections and Criminal Justice Task Force

Seeking to improve the state's corrections and criminal justice systems, the 2013 Mississippi Legislature passed House Bill 1231 to establish the bipartisan, inter-branch Corrections and Criminal Justice Task Force (Task Force). Governor Phil Bryant signed the measure into law on April 4. The Task Force is comprised of 21 stakeholders including Democratic and Republican

legislators as well as judges, prosecutors, law enforcement officials, defense attorneys, a county supervisor, and a representative from the office of the state attorney general.

The Task Force was charged with submitting “a final report that contains a detailed statement of findings, conclusions, and recommendations of the task force to the Legislature, the Governor and to local and tribal governments by December 31, 2013.” Chaired by Corrections Commissioner Christopher Epps, the Task Force identified its goals as developing policies that:

- Clarify sentencing laws and policies, strengthen community supervision to hold offenders accountable, and improve the relationship between the corrections and criminal justice systems.
- Control corrections costs by focusing prison space on violent, career criminals and addressing the inefficiencies in the corrections and criminal justice systems.
- Protect public safety by investing in programs, policies, and practices that reduce recidivism.

Beginning in the summer of 2013 and extending through the end of the calendar year, the full Task Force met seven times to analyze Mississippi’s sentencing and corrections data, evaluate programs and policies across the state’s criminal justice system, and consider proven approaches to sentencing and corrections from other states. Using this information, Task Force members broke into three policy development subgroups, each focused on different parts of the sentencing and corrections system. Representative Andy Gipson chaired the subgroup on sentencing policies, Senator Willie Simmons chaired the subgroup on prison release policies, and Senator Hob Bryan chaired the subgroup on supervision policies. The goal of the subgroups was to craft policy options, including proposals to reinvest savings from averted prison spending into practices and programs proven to protect public safety by reducing recidivism.

Task Force members received input from a wide range of stakeholders. In November, Governor Phil Bryant held a Public Safety Summit, convening a diverse group of legislators and public safety professionals to solicit ideas for upholding the state’s commitment to public safety while containing prison growth. The Task Force held a roundtable of victims, survivors, and victim advocates to identify key priorities from the victim perspective. Additionally, the Task Force subgroups received input from judges, law enforcement, and other criminal justice stakeholders throughout their policy development work.

The Task Force received technical assistance from the public safety performance project of the Pew Charitable Trusts and its partner, the Crime and Justice Institute at Community Resources for Justice. This technical assistance was provided in conjunction with the Justice Reinvestment Initiative of the U.S. Department of Justice (JRI). JRI has provided similar assistance to two dozen states by helping to analyze sentencing and corrections data in order to develop research-based, fiscally sound policy options that protect public safety, hold offenders accountable, and contain corrections costs.

National Picture

Mississippi’s challenges are not unique. Across the country, state prison populations and corrections budgets have expanded rapidly in recent decades. In 2008, the total national incarceration rate rose to the point that one in every 100 American adults were behind bars.⁷ From

the mid 1980's to the mid 2000's, spending on corrections was the second fastest growing state budget item behind Medicaid.⁸

However, in recent years many states have taken steps to reduce their prison populations while holding public safety paramount. After 38 years of uninterrupted growth, the national prison population declined in 2009 and has dropped slightly now for three years in a row.⁹ Twenty-nine states reduced their imprisonment rates over the past five years, and the crime rate went down in all but three of them.¹⁰ During this same period, Mississippi's imprisonment rate increased by five percent, the ninth largest increase in the nation, while its crime rate declined at almost half the speed of the national rate.¹¹

Many states have taken substantial steps to rein in the size and cost of their corrections systems through a "justice reinvestment" strategy. A number of states across the South, including Arkansas, Georgia, Kentucky, North Carolina, South Carolina, and Texas, as well as a host of others outside the South, have implemented reforms to improve public safety and control corrections costs. These states revised their sentencing and corrections policies to focus state prison beds on violent and career offenders and then reinvested funds from averted prison expansion into cost-effective strategies proven to reduce recidivism.

In 2007, for instance, Texas was projected to need up to an additional 17,000 prison beds in five years. Rather than continue to fund unchecked expansion, Texas policymakers passed strategic reforms and invested \$241 million into treatment and diversion programs.¹² The results have been dramatic: state taxpayers have now avoided \$1.5 billion in construction costs and \$340 million in annual averted operations costs.¹³ Additionally, the parole failure rate has declined 39 percent since 2007.¹⁴ Meanwhile, the statewide crime rate has fallen to levels not seen since the 1960s.¹⁵

In 2011, policymakers in Georgia faced a projected eight percent prison population growth over the next five years at a cost of \$264 million. Rather than invest more taxpayer dollars in prisons, Georgia legislators looked to more cost-effective approaches. They unanimously passed a package of reforms that controlled prison growth through changes to drug and property offense sentences, and invested in improving public safety by strengthening community supervision and investing in local sanctions, treatment, and accountability courts.

Key Findings Reviewed by the Task Force ¹

Research on Imprisonment and Mississippi's Prison Data

Two primary factors determine the size of a state's prison population: the number of offenders entering prison and the length of time those offenders remain behind bars. Mississippi has grown in both of these categories: annual admissions to prison grew 35 percent in the last decade and length of stay for newly sentenced offenders increased 17 percent. Task Force members reviewed the latest research on prison admissions and length of stay before taking an in-depth look at Mississippi's own data to understand more about what was fueling the state's growth.

Task Force members also reviewed data that found the use of prison as a punishment for criminal offenders serves multiple purposes: retribution, offender rehabilitation, and public safety. Prisons

¹ Data compiled by Pew and reviewed by the Task Force.

can enhance public safety both by keeping offenders off of the streets (incapacitating them from committing further crime), and by deterring future criminal behavior.

The Task Force also reviewed research that shows prison can have the opposite effect for certain offenders, bringing them into closer contact with each other while removing them from positive community and family influences. A growing consensus among researchers around the "schools of crime" theory suggests that for many low risk, nonviolent offenders the negative impacts outweigh the positive; that is, sending offenders to prison can cause them to commit more crime when they get out rather than less.¹⁶

The Task Force considered the relationship between the length of prison terms and recidivism. Many observers assert that longer prison terms are more effective deterrents because they set a higher price for criminal behavior and hold offenders until they are beyond their high-crime years.¹⁷ Others claim that longer time behind bars actually increases the chances that inmates will return to a life of crime by breaking their supportive bonds in the community and hardening their association with other criminals. The best research finds that the two forces may cancel each other out. Several studies, on different populations and using varied methodologies, have failed to find consistent effects of longer prison terms on recidivism rates.¹⁸

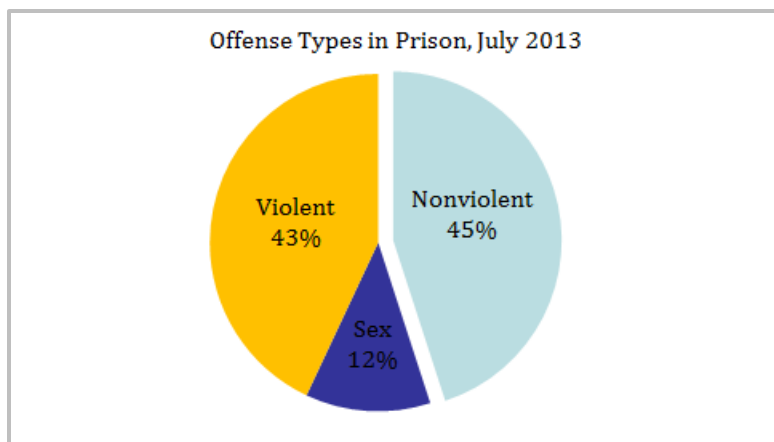
This research regarding prison admissions and length of stay provoked significant discussion among Task Force members about which offenders should be sent to prison and how long they should stay. Backed with this research, many states have recently implemented strategies that focus prison beds on serious and violent offenders, sending fewer low risk, nonviolent offenders to prison or reducing the length of prison stays for lower level drug and property offenders.

Mississippi, however, continues to increase the number of offenders sent to prison and the length of time spent behind bars. Significant numbers of these inmates were convicted of nonviolent offenses, including some who may be more effectively and affordably sanctioned with community supervision or with shorter periods of incarceration followed by supervision.

Many Prison Beds Focused on Nonviolent Offenders

An independent analysis of Mississippi Department of Corrections' (MDOC) data revealed that nearly three-quarters of individuals admitted to prison in FY2012 were sentenced for nonviolent crimes. Between FY2002 and FY2012, the number of nonviolent offenders admitted to prison rose 33 percent. This growing population of nonviolent offenders is also staying longer: newly sentenced nonviolent prisoners released in FY2012 stayed in prison an average of 10.5 percent longer than those released 10 years before. For some nonviolent offense types, this growth in length of stay was even more pronounced: length of prison stay for drug possession offenders, for example, rose 31 percent from FY2002 to FY2012.

Increases in admissions to prison and length of stay in prison for nonviolent offenders have resulted in a current prison population that is nearly half nonviolent offenders.



Many Prison Beds Focused on Offenders Admitted for Technical Revocations

The Task Force reviewed data showing that many offenders enter prison not because of a new criminal sentence but because of a revocation from community supervision.¹⁹ Prison admissions for revocations increased 84 percent from FY2002 to FY2012. In fact, FY2012 was the first time more offenders entered prison from a revocation from supervision (5,481) than from a new criminal sentence (4,973).

In FY2012, the average length of prison stay for revocations was 20 months. High admissions compounded with long lengths of prison stay have resulted in a standing prison population that is over one third (38 percent) revocations.

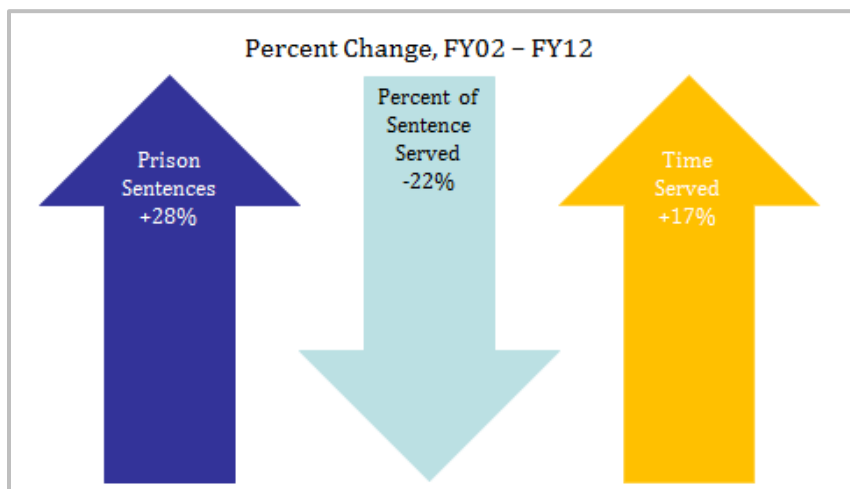
Moreover, the vast majority of offenders revoked to prison were not admitted for engaging in new criminal activity but rather for failing to comply with the terms of their supervision sentence. These revocations are called “technical revocations” and include conduct like missing drug tests or failing to report to probation officers. In FY2012, 75 percent of the offenders entering prison on a revocation of probation were revoked on a technical violation.

Lack of Clarity in Sentencing

The length of criminal sentences handed down by courts in Mississippi has grown 28 percent over the past decade. The Task Force heard repeatedly from criminal justice practitioners, including judges, district attorneys, and victims, that they are often unsure as to what percentage of a sentence an offender will serve in prison. Due to a variety of earned time and early release mechanisms, it is difficult to predict how much time an offender will spend in prison. The percent of a sentence served in prison can vary widely even within the same offense type based on how much time an offender earns and whether he is paroled or released on house arrest by MDOC. Of the nonviolent offenders released in FY2012, 24 percent had served less than 25 percent of their sentence. Of the violent offenders released that same year, 43 percent had served less than 50 percent of their sentence. The Task Force believes this uncertainty has led courts to issue longer sentences, even if they are not actually trying to ensure that offenders serve more time behind bars.

Even though earned time policies have reduced the percentage of a sentence served (down 22 percent), this decrease has not offset the increase in sentence lengths: offenders are now serving a smaller percentage of much longer sentences, resulting in more time served in prison. For newly

sentenced prisoners, average time served in prison went up by almost 17 percent over the last decade.



Research on Community Corrections and Mississippi's Data

The Task Force conducted a review of research on evidence-based policies and practices in community supervision and then assessed Mississippi's practices against these standards. The Task Force identified four key principles in assessing the state's community corrections system: (1) incorporating surveillance and treatment, (2) responding to violations of supervision with swift, certain, and proportional sanctions, (3) encouraging compliance through positive incentives, and (4) focusing resources on the first weeks and months following release from prison to ensure successful reentry.

An increase in the use of post-prison supervision, along with general growth in the size of the prison population, has led to a rapid expansion in the community corrections population. It has increased by nearly 10,000 offenders in the past five years, topping 38,600 offenders in July 2012. However, the size of the community corrections population is not reflected in the proportion of dollars in the corrections budget spent on supervision. Just seven percent of the total corrections budget (\$23 million) supports community supervision for the nearly 40,000 felony offenders on probation, parole, and house arrest.

Incorporating Surveillance with Treatment

Research makes clear that effective community supervision integrates treatment with surveillance.²⁰ Evidence-based drug and alcohol treatment programs can successfully lower recidivism among participants involved in the criminal justice system,²¹ and drug treatment in the community has been shown to reduce crime more than drug treatment in prison.²² However, MDOC currently restricts its community corrections funding to surveillance (reporting, fee collection, drug testing, etc.) and allocates no funding for drug, alcohol or mental health treatment for offenders on community supervision. Low-income offenders in rural areas have especially scarce treatment options.

Swift and Certain Responses to Violations

Another research-proven practice identified by the Task Force is responding to violations of supervision with swift, certain, and proportional sanctions. Swift and certain sanctions have been shown to reduce violations and recidivism, resulting in fewer revocations to prison.²³ An effective sanctioning process includes a graduated range of sanctions from low-intensity, such as community service hours, to more severe sanctions like short jail stays. However, structured graduated sanctioning, which has been adopted with success by probation and parole departments in states across the country, does not exist in Mississippi. The only tool available to supervision officers in responding to technical violations of supervision, such as missing drug tests or failure to report, is a full revocation to prison. Because these revocations have severe consequences (leading to an average time behind bars of 20 months), they are imposed inconsistently and with significant delays. The absence of swift and certain deterrents leads to high violation rates, extensive use of prison beds, and high taxpayer costs.

A lack of community-based services and sanctions not only constrains community corrections officers, it can also result in judges sending lower-risk offenders to prison simply to access treatment or because no other meaningful options exist.

Frontloading Supervision Resources

Research also indicates that offenders are most likely to commit crimes in the first few days, weeks, and months after release from prison. To address this high risk period, research demonstrates that supervision resources are more effective when they are targeted to this critical period. However, Mississippi currently has few resources for those reentering the community. More than 9,000 offenders leave state prisons each year, but Mississippi has no system-wide reentry programming and a total of just 100 beds in three transitional reentry centers across the state.

Policy Recommendations

After analyzing key drivers of the prison population, reviewing examples of successful criminal justice innovations in other states, and studying the growing body of research about what works in corrections, the Task Force proposes a comprehensive set of changes to sentencing and corrections policy and practice in Mississippi. These 19 recommendations will:

- Ensure certainty and clarity in sentencing,
- Expand judicial discretion in imposing alternatives to incarceration,
- Focus prison beds on violent and career offenders,
- Strengthen supervision and interventions to reduce recidivism, and
- Establish performance objectives and measure outcomes.

Ensure certainty and clarity in sentencing

1. Institute “true minimums”

Due to a variety of earned time and early release mechanisms, it is difficult to predict how much time an offender will spend in prison. The percent of a sentence served in prison can vary widely

even within the same offense type based on how much time an offender earns and whether he is paroled or released on house arrest by MDOC.

Recommendation: Institute “true minimums” to guarantee that nonviolent offenders serve at least 25 percent and violent offenders serve at least 50 percent of their court-ordered sentences. In the case of violent offenders, it would only affect those offenders currently earning trusty time and, therefore, able to leave before serving 50 percent of their sentences. Offenders who are eligible for earned time or parole would remain eligible and would earn time at the same rate but would not be able to be released before meeting the minimum thresholds.

This policy would only increase the percent of the sentence served; it would not decrease the percent of the sentence served for any offender. Offenders who are currently statutorily required to serve 100 percent or 85 percent of their sentence would continue to serve at least those minimums.

2. Eliminate the Intensive Supervision Program as an early-release mechanism

Mississippi allows the conditional release of certain nonviolent offenders to the Intensive Supervision Program (house arrest) within 15 months of their earliest release date if they are approved by MDOC’s Joint Placement Board.

Recommendation: To support “true minimums” and promote greater clarity in sentencing, remove MDOC’s ability to release offenders to house arrest. The policy would not affect a judge’s ability to incorporate the use of house arrest as a sentencing option.

3. Clarify what constitutes a violent offense

Mississippi inconsistently uses the term “violent” in establishing criteria for various policies, including eligibility for parole, habitual offender enhancements, and pre-trial diversion programs. This has led to confusion about the amount of time an offender is required to serve and which offenses are and are not crimes of violence.

Recommendation: Create one clear definition or list of violent offenses and apply it consistently across all policies that use “crime of violence” to determine eligibility.

4. Develop case plans for all parole-eligible offenders at admission and restrict parole hearings to non-compliant offenders

Mississippi’s parole grant rate has fluctuated widely over a relatively short period, from as high as 57 percent in November 2011 to as low as 30 percent in October 2012. Additionally, Parole Board members report that many offenders are initially denied release in order to complete treatment and programming deemed necessary for successful reentry. These nonviolent offenders must then return to the Board for second and subsequent hearings creating inefficiencies and delays.

Recommendation: Ensure a more consistent parole grant rate by developing case plans for all parole-eligible inmates at admission and restricting parole hearings to non-compliant offenders. This includes:

- a. Developing individual case plans for all parole-eligible inmates at admission. Case plans will include programming and services identified by a validated assessment tool, and sentencing

requirements (if applicable). The case plan should be achievable before the inmate's parole eligibility date; and

- b. Restricting parole hearings to only those offenders who have (1) failed to comply with the case plan or with general MDOC behavioral requirements, or (2) if the victim has requested a parole hearing. Otherwise, inmates will be paroled at their parole eligibility dates.

5. Enhance and standardize victim notification

In Mississippi, how and when a victim is notified of an offender's release from custody differs widely depending upon the offender's release type. Some release policies require notification within 30 days, others within 15 days and some simply require 48 hours. Additionally, while it is the policy of the Parole Board to provide 30-day advance notice of a parole hearing to victims, this timeline has not been established statutorily.

Moreover, only those victims who have registered with the MDOC are notified of Earned Release Supervision, Intensive Supervision Program, and expiration of sentence releases.

Recommendation: Create a uniform victim notification policy that reaches the most victims possible. This includes:

- a. Establishing a uniform 15-day victim notification requirement for offender releases, regardless of release type;
- b. Codifying the Parole Board's existing policy of providing 30-day victim prior notification of parole releases; and
- c. Mandating that notifications are provided to victims registered for notification with MDOC as well as to victim assistants in the District Attorney's Office where the case originated.

Expand judicial discretion in imposing alternatives to incarceration

6. Expand eligibility for alternatives to incarceration

Mississippi has a number of alternatives to incarceration for nonviolent offenders: non-adjudicated probation, probation, and house arrest. Non-adjudicated probation is a period of probation that, if successfully completed, results in expungement and no felony record. Probation is a sentence of community supervision and house arrest allows offenders to remain in their community under electronic monitoring. Current statutory restrictions limit judges' discretion to impose non-prison sentences that often may be more effective at reducing recidivism.

Recommendation: Expand judicial discretion to impose non-prison alternatives by:

- a. Lifting the exclusion to non-adjudicated probation for all drug offenses with the exception of trafficking convictions;
- b. Lifting the exclusion to probation for offenders who have a previous felony conviction; and
- c. Lifting the exclusion to the Intensive Supervision Program for offenders who have a previous felony conviction and authorizing judges to impose the Intensive Supervision Program to low risk, nonviolent offenders when appropriate.

7. Expand eligibility for drug courts

Well-implemented drug courts can significantly reduce recidivism and the incidence of substance abuse. Over the last decade, Mississippi has developed an expansive drug court system and now has a drug court in every circuit. However, current law restricts many nonviolent offenders whose criminal activity is driven by substance abuse/addiction and who would benefit from a highly-regimented drug court program.

Recommendation: Broaden statutory criteria for drug court eligibility by eliminating the automatic disqualification for offenders convicted of a commercial drug offense or a driving under the influence offense, coupled with careful screening of all drug court eligible offenders prior to entering the drug court program.

Focus prison space on violent and career criminals

8. Create targeted punishments for property offenses

Mississippi's property offense statutes do not distinguish between vastly different levels of criminal conduct. For example, the theft of \$2,000 can trigger the same criminal sentence as the theft of \$50,000. This sentencing system can lead to wide disparities in penalties for similar conduct. For instance, in a review of sentencing documents related to Grand Larceny convictions, two offenders who had stolen \$556 and \$560 respectively received 36-month and 96-month sentences. Neither offender had been previously incarcerated. Additionally, the current threshold for felony property crimes is \$500, a figure that has not been adjusted for 10 years. Many of Mississippi's southern neighbors have recently raised their felony theft thresholds. South Carolina raised its theft threshold to \$2,000 in 2010; Georgia raised its threshold to \$1,500 in 2012.²⁴

Recommendation: Differentiate levels of property crimes by:

- a. Increasing the property value threshold to \$1,000 for felony theft and related offenses (this threshold has not been increased in 10 years);
- b. Establishing tiered property value thresholds beginning at \$1,000 with increasing sentence ranges, including enhanced penalties for higher level thefts; and
- c. Establishing a criminal enterprise law with enhanced penalties to deter organized retail theft.

See details below:

Property value	Misdemeanor property and forgery	Felony property and forgery
\$1,000 or less	Presumptive probation or less than 12 months	
\$1,000 or less, 3 rd and subs		No more than 3 years
\$1,000 to \$5,000		No more than 5 years
\$5,000 to \$25,000		No more than 10 years
\$25,000 or more		No more than 20 years

9. Create targeted punishments for drug offenses, with the most severe punishments focused on drug dealers (traffickers)

Mississippi's commercial drug offense statutes do not differentiate between offender conduct that is driven by addiction and conduct that is driven by greed and financial gain. An offender convicted of selling one gram of cocaine faces the same sentencing range as a person convicted of selling 40 grams. This disparity creates a wide range of sentences for similar conduct and provides little legislative guidance for addressing the diverse criminal conduct encompassed by these offenses.

Even within possession sentences, which are currently structured by weight, the wide sentence ranges lead to disparate punishment for the same offenses.

Recommendation: The Task Force examined several policy options and recommends restructuring drug sentences that:

- a. Reduce the use of imprisonment for low-level drug possession offenders;
- b. Establish a weight-based tiered system for commercial drug offenses similar to the weight-based system for possession offenses, thereby aligning sentence ranges with the seriousness of the offense; and
- c. Create a "trafficking" offense that would apply to drug dealers based on possessing a large amount of a controlled substance and establishing a very stiff penalty.

Depending on the approach taken, the legislature could achieve significant cost savings based on averted prison growth.

10. Implement a "geriatric parole hearing trigger"

Geriatric prisoners are often more expensive than younger inmates because of their higher medical costs. At the same time, they are often at a lower risk of recidivism than younger inmates because they have "aged out" of their crime committing years. However, Mississippi currently houses 799 offenders who are 60 years old or older.

Recommendation: Replace the existing conditional geriatric release statute with a "parole hearing trigger" which would require parole hearings for nonviolent offenders who are 60 years old or older and have served at least 10 years of their sentences behind bars. When evaluating geriatric offenders for parole under this policy, the Parole Board would consider likelihood of re-offense alongside criminal history, behavior in prison, participation in treatment, and plans pending release. This provision would exclude offenders sentenced under the habitual offender statute. The Parole Board would make all decisions regarding release.

11. Establish consistency in "trusty time"

Trusty earned time is available to certain offenders who meet classification criteria and participate in work or educational programming. Trusty earned time is available to drug sale offenders but not available to offenders convicted of drug possession with intent, a less serious offense.

Recommendation: Expand eligibility for trusty time to possession with intent offenses. Current exclusions for drug trafficking offenders and offenders sentenced under the habitual offender statute will remain in place.

12. Ensure nonviolent offenders are parole eligible

Parole eligibility is restricted to nonviolent offenders, but current parole statutes exclude certain classes of nonviolent offenders, including offenders sentenced for enhanced felonies such as possession of a controlled substance within 1,500 feet of a church. Additionally, recent court rulings have identified a lack of clarity in the parole statute, rendering some commercial drug offenders ineligible for technical reasons.

Recommendation: Ensure that parole eligibility is available to nonviolent offenders by:

- a. Lifting restrictions on parole eligibility for nonviolent offenders sentenced under an enhancement; and
- b. Clarifying that lower-level commercial drug offenses are nonviolent for the purposes of parole consideration and thereby permitting MDOC to continue issuing parole hearing dates to these offenders, while retaining ineligibility for traffickers and habitual offenders.

Strengthen supervision and intervention

13. Implement graduated sanctions and incentives

Mississippi law does not authorize community supervision field officers to respond to technical violations of community supervision, such as missing drug tests or treatment sessions, with intermediate sanctions. Instead officers must either let the minor misconduct go unsanctioned or pursue a full revocation to prison. In many cases, this results in a response that is either inadequate or disproportionately severe.

Recommendation: Develop a structured system of intermediate sanctions and incentives to swiftly and proportionately respond to both positive behavior and technical violations of supervision conditions. When determining the sanction to be imposed, the field officer will take into account the offender's assessed risk level, previous violations and sanctions, and severity of the current and prior violations. Elements of the system would include:

- a. A graduated system of sanctions that includes verbal warnings, increased reporting, increased drug and alcohol testing, mandatory substance abuse treatment, loss of earned credits, and short jail stays of up to two days for certain violations (not to exceed four days in any month).
- b. A graduated system of incentives for compliance that includes verbal recognition, reduced reporting, and credits for early discharge.
- c. A requirement that the supervision officer notify the sentencing court or Parole Board when a sanction is imposed.

14. Create specialized detention centers, programming, and cap incarceration periods for technical violations of supervision

Offenders revoked for technical violations of community supervision are returned to prison for up to the remainder of their sentence. Entering from the community, these probationers and parolees join the general prison population where they mix with violent and career offenders.

Recommendation: To (1) ensure that lower-level probationers and parolees are not mixed in with the general prison population, (2) target factors driving offender misconduct, such as addiction, and (3) provide an effective and proportional response to noncriminal violations:

- a. Re-designate existing MDOC facilities as specialized technical violation centers (TVCs) with a corresponding sanctioning structure for technical revocations of supervision. Judges (for probation) and the Parole Board (for parole) will retain supervision authority and will be able to impose periods of imprisonment for parole or probation violations under the following graduated structure:
 - i. Up to 90 days in a TVC for the first revocation
 - ii. Up to 120 days in a TVC for the second revocation
 - iii. A judge or the Parole Board may opt to impose either up to 180 days in a TVC or up to the full remaining term in prison for the third revocation
 - iv. A judge or the Parole Board may impose up to the full remaining term in prison for the fourth and subsequent revocations
- b. The revocation term imposed in a TVC may not be reduced and the violator will serve the full term imposed.
- c. TVCs will be specially equipped to address those underlying factors leading to offender violations, including substance abuse, and other needs identified by a validated risk and needs assessment as a necessary component of the person's recidivism reduction plan.

15. Streamline jail transfers

Mississippi does not set limitations on the length of time probationers and parolees can be held in county jails awaiting revocation hearings. A review of parole revocation reports revealed an average wait time in jail of 45 days and anecdotal reports suggest even longer wait times for probationers. These delays limit the ability of public safety professionals to hold offenders accountable swiftly and certainly, and they place a heavy burden on local jail space and county funds.

Recommendation: Statutorily limit to 21 days the time parolees and probationers can be held in county jails awaiting revocation proceedings for technical violations. If the hearing is not held in that timeframe, the offender will be released. This policy would not impose timelines for revocations with an associated new criminal charge. Additionally, to further streamline jail transfers, statutorily authorize the use of electronic hearings for both preliminary and formal revocation hearings.

Ensure quality and sustainability of reforms

16. Institute drug court standards and reporting requirements

By effectively addressing the risks and needs of participating offenders, drug courts can reduce recidivism and rehabilitate offenders. However, Mississippi's drug courts operate largely independently from county to county with few standardized practices, including offender eligibility criteria, length of program, supervision or treatment standards, and data collection requirements.

Recommendation: Institute statewide standards for all drug courts based on the 10 key components established by the National Association of Drug Court Professionals, including:

- a. Requiring all drug courts to have treatment services appropriate for drug court participants;
- b. Requiring all drug courts to annually collect and report participant data;
- c. Requiring the Administrative Office of the Courts (AOC) to establish a drug court certification process for continued state funding;
- d. Requiring AOC collect and report participant data to the Governor and the Judiciary, Corrections, and Ways and Means Committees;
- e. Requiring drug court participants to be moderate to high risk and in need of treatment;
- f. Requiring the use of validated assessments including clinical assessments to determine whether an offender meets the moderate to high recidivism risk requirement and the moderate to high treatment needs requirement;
- g. Requiring all drug courts to have clinical professionals to assist in making treatment decisions and delivering treatments; and
- h. Assigning a group to be responsible for monitoring and evaluation of evidence-based practices and require data collection and reporting on performance and outcome measures.

17. Provide enhanced training for decision makers and community supervision officers

Recommendation: To ensure that stakeholders across the criminal justice and corrections systems have the latest information about recidivism reduction and the best types of interventions and treatment for offenders, statutorily require annual trainings on evidence-based practices. This will include:

- a. Establishing an annual training schedule and providing training on evidence-based practices for parole board members based on guidelines set by nationally recognized organizations; and
- b. Requiring annual trainings for probation and parole officers and supervisors, including instruction on criminal risk factors, how to target them, and how to support and encourage compliance and behavior change.

18. Require collection of key performance measures and establish an oversight council

Reforms to Mississippi's corrections and criminal justice systems will require careful implementation and oversight, necessitating enhanced data collection. Several states that have implemented similar comprehensive reforms, including South Carolina and Georgia, have mandated data collection on key performance measures and established oversight councils to track implementation and report on outcomes.

Recommendation: Require enhanced data collection and establish an Oversight Task Force composed of legislative, executive, and judicial branch designees as well as criminal justice practitioners. Elements of this recommendation include:

- a. Requiring MDOC, the Parole Board, and AOC to collect and report data to the Oversight Task Force on key performance measures including, but not limited to: recidivism rates, percentage of time served, average length of stay, drug court outcomes, and prison population;

- b. Requiring the Oversight Task Force to meet at least twice per year to monitor the reforms and report back to the Legislature on their implementation; and
- c. Charging the Oversight Task Force with making additional recommendations to the Legislature on future legislation and policy options.

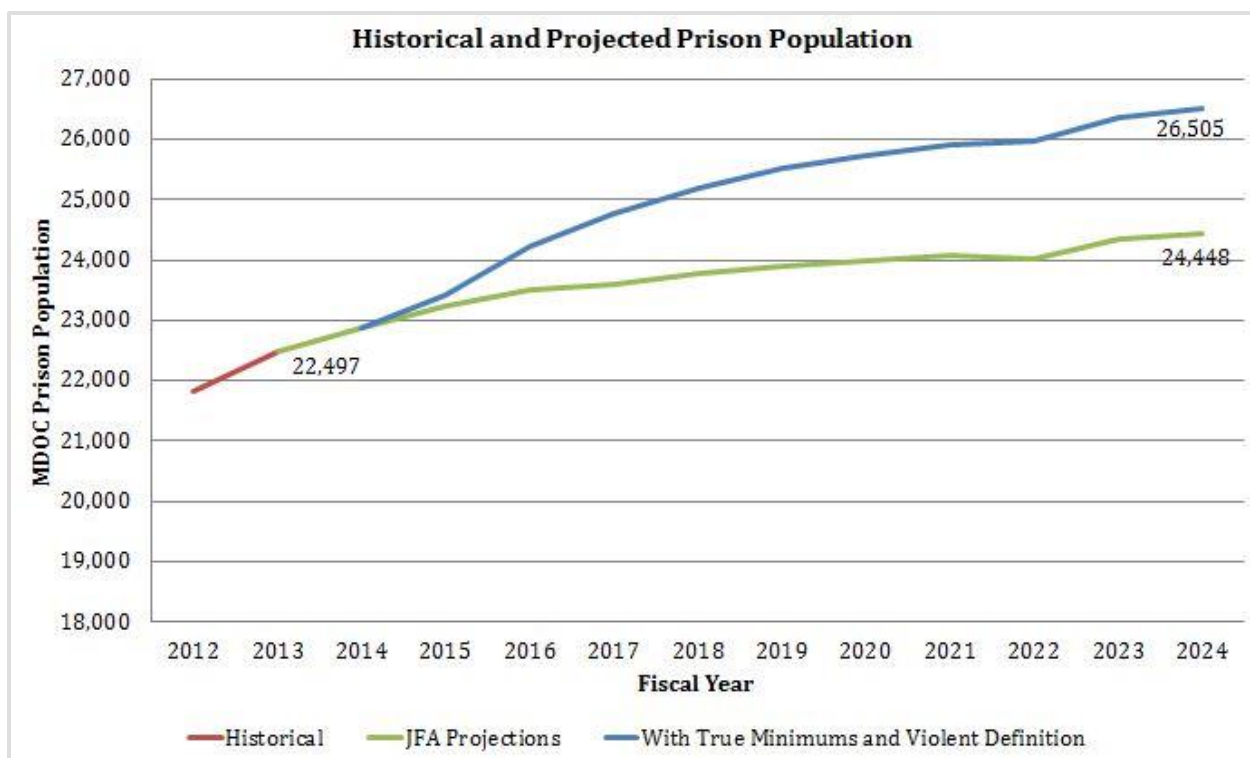
19. Ensure policy makers are aware of the impact of all legislative proposals that could affect prison populations

Many sentencing and corrections reforms do not affect biennial budgets, but have significant impacts on budgets four, six, and eight years out or longer. Fiscal impact statements that cover a longer period of time would give policy makers a more accurate account of the budget implications of proposed sentencing and corrections policies.

Recommendation: Require 10-year fiscal impact statements to accompany future sentencing and corrections legislation.

Policy Impacts

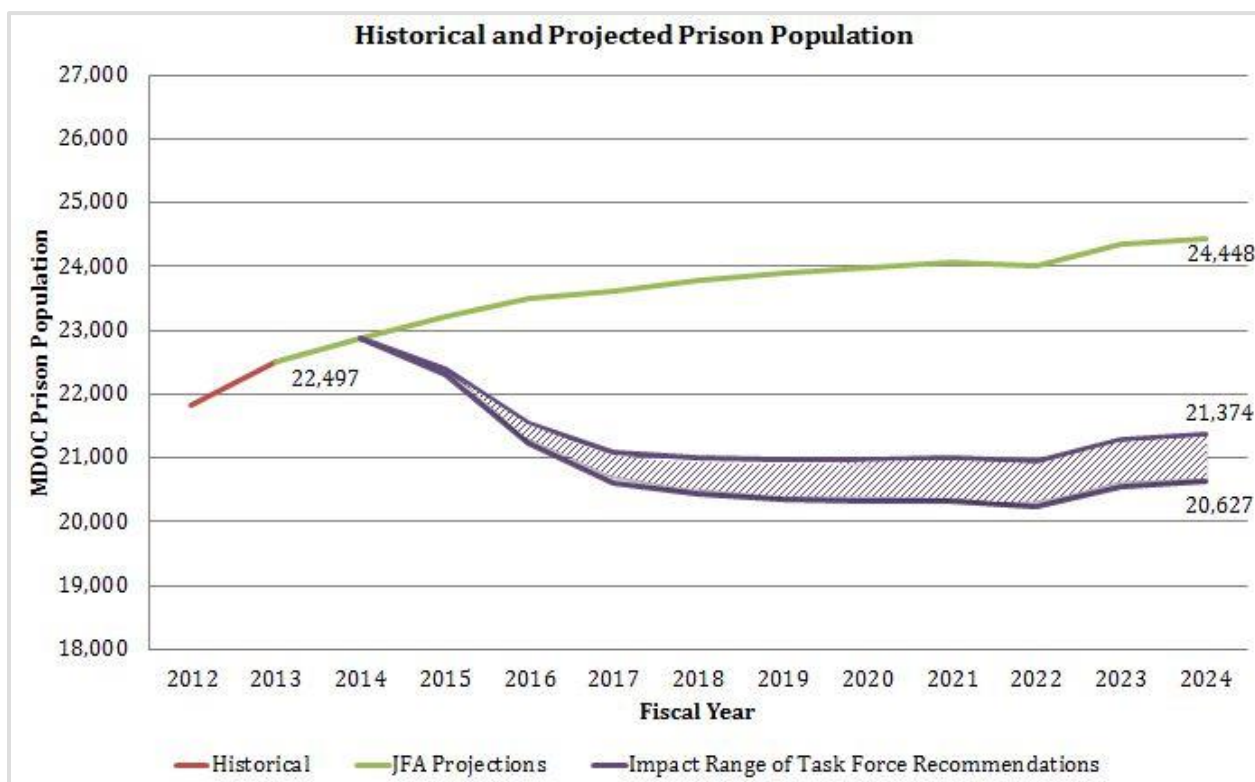
The subset of policy proposals specifically designed to create more clarity and certainty in the sentencing system – including instituting “true minimums,” removing MDOC’s authority to release offenders early to house arrest, and creating a uniform definition of violence – would increase the size of Mississippi’s prison population significantly, adding further to the projected 10-year prison growth.



However, balancing the policy proposals designed to ensure clarity in sentencing with the remainder of the package, including those policies designed to focus prison beds on serious violent

offenders, results in a significant impact on projected prison growth. In fact, the full package of Task Force reforms will not just protect public safety, and ensure clarity in sentencing; it is also projected to avert all of the anticipated 10-year prison growth and safely reduce Mississippi's prison population below current levels.

Depending on the specific sentencing ranges adopted for a drug sentencing policy, the full Task Force package would save the state from funding 3,074 – 3,821 prison beds over the next 10 years, averting all of the projected inmate growth, including the additional inmate growth from instituting true minimums. At minimum, the Task Force policies would avert \$266 million in otherwise required spending.



Reinvestment Priorities

The Task Force strongly recommends that savings from averted prison costs be reinvested into fully funding drug courts, strengthening community supervision, improving reentry services, and reducing burdens on local jurisdictions.

1. Invest in adult and juvenile drug courts

Mississippi's adult and juvenile drug courts are currently funded through a \$10 assessment on traffic fees. This funding scheme has not been adjusted since it was implemented in 2004, though the number of drug courts has increased over three-fold since that date. Growth in the number of

courts has outstripped resources and funding for Mississippi's drug courts was cut by 42 percent for FY2014.²⁵

Recommendation: Fully fund Mississippi's juvenile and adult drug courts, including money to increase treatment options available to participants as well as develop other services including workforce training, life-skills training and GED classes. Additional monies would also be used to increase AOC infrastructure to ensure that drug courts are adhering to state standards and following best practices.

2. Invest in enhanced supervision practices, including funding for treatment and electronic monitoring

MDOC currently allocates no funding for drug, alcohol, mental health, anger management, or sex offender treatment for offenders on community supervision. Additionally, MDOC only has enough electronic monitoring capacity for offenders on house arrest and not enough to use with probationers and parolees.

Recommendation: In order to improve public safety outcomes for offenders on supervision, direct savings to expand Mississippi's capacity for community sanctions and services, including drug, alcohol, mental health, anger management, and sex offender treatment, and electronic monitoring. Additionally, in order to direct resources to the highest risk offenders, require MDOC to use a risk and needs assessment tool to guide decisions about surveillance levels and treatment plans.

3. Improve reentry services by increasing the capacity of residential reentry centers and implementing mandatory reentry planning

More than 9,000 offenders leave Mississippi prisons each year, but the state has no system-wide reentry programming and just three transitional reentry centers, which together have fewer than 100 beds. Additionally, only certain offenders participate in the pre-release program and receive comprehensive reentry planning and preparation.

Recommendation: Improve reentry services for offenders entering the community by:

- a. Increasing the capacity of residential reentry services (also known as half-way houses); and
- b. Implementing mandatory reentry planning for all offenders returning to the community.
Reentry planning will begin at least three months prior to an offender's presumptive release date and will include both (1) a pre-release assessment, identifying whether an inmate is able to attend to basic needs upon release, and (2) a written discharge plan.

4. Reduce burdens on local jurisdictions

By statute, local jurisdictions are reimbursed for holding offenders in county jails who are awaiting revocation hearings if and only if the MDOC has available funds. No funds were available in the preceding two fiscal years, creating a substantial burden on local jurisdictions.

Recommendation: Subject to the adoption of the other recommendations contained herein, the Task Force recommends striking the clause that makes reimbursements contingent upon available funds and reinvesting funds from averted prison costs towards reimbursing local jurisdictions for holding probationers and parolees awaiting revocation hearings.

Items Recommended for Further Review

Some Task Force members expressed interest in pursuing policies around early childhood education and Attorney General Jim Hood highlighted its benefits at Governor Bryant's Public Safety Summit. Studies show that children who attend high-quality, voluntary pre-kindergarten demonstrate gains that persist throughout their school years, including improved literacy and reduced need for special and remedial education. These benefits attained during childhood and adolescence can in turn lead to decreased criminal behavior, as well as greater education attainment, higher lifetime earnings, and less dependence upon welfare.²⁶ Several members of the Task Force suggested that a long-term approach to crime reduction through investments in early childhood education should be explored further.

Additionally, some Task Force members acknowledged the need for comprehensive studies on several issues that came up during the Task Force work, including an ongoing review of re-entry services and best practices; a review of mental health populations in Mississippi's jails and prisons; and finally a review of juvenile offenders in the adult system. While, these issues were ultimately deemed too complex to be adequately addressed within the Task Force's limited timeframe and scope of authority, the Task Force suggested they were worthy of further review.

¹Unless otherwise cited, the analyses in this report were conducted for the Corrections and Criminal Justice Task Force by the public safety performance project of the Pew Charitable Trusts using prison population data 2003 – 2013 provided by the Mississippi Department of Corrections; prison population data 1992 – 2012 from Department of Justice, Bureau of Justice Statistics, Prisoner Series, <http://www.bjs.gov/index.cfm?ty=dcdetail&iid=269>.

² Department of Justice, Bureau of Justice Statistics, National Prisoner Series, 2012.

³ Wendy Naro Ware and Roger Ocker, Ten-Year Adult Secure Population Projection, 2014-24, Mississippi Department of Corrections, 2013.

⁴ House Bill 1231, 2012, <http://billstatus.ls.state.ms.us/documents/2013/html/HB/1200-1299/HB1231PS.htm>.

⁵ National population data from the U.S. Census Bureau, <http://www.census.gov/>.

⁶ The offense categories used for this report are based on the National Crime Information Center offense codes from the FBI. However, two crimes considered nonviolent under NCIC classifications were added to the violent category for the purposes of this report – specifically child abuse and DUI resulting in injury or death.

⁷ Pew Center on the States, *One in 100 Behind Bars in America*, 2008, <http://www.pewstates.org/research/reports/one-in-100-85899374411>

⁸ National Association of State Budget Officers, *State Expenditure Report FY 2006*, 2007, <http://www.nasbo.org/Publications/PDFs/fy2006er.pdf>

⁹ Department of Justice, Bureau of Justice Statistics, National Prisoner Series.

¹⁰ Department of Justice, Bureau of Justice Statistics, National Prisoner Series; Federal Bureau of Investigation, Uniform Crime Reports, 2006 and 2011, <http://www.ucrdatatool.gov/>.

¹¹ Department of Justice, Bureau of Justice Statistics, National Prisoner Series; Federal Bureau of Investigation, Uniform Crime Reports, 2006 and 2011.

¹² Council of State Governments Justice Center, *Assessing the Impact of the 2007 Justice Reinvestment Initiative*, 2009 <http://www.ncsl.org/portals/1/Documents/cj/texas.pdf>

¹³ Council of State Governments Justice Center, *Lessons from the States: Reducing Recidivism and Curbing Corrections Costs Through Justice Reinvestment*, 2013, <http://csgjusticecenter.org/jr/kansas/media-clips/lessons-from-the-states-reducing-recidivism-and-curbing-corrections-costs-through-justice-reinvestment/#.UqcwDPTkuhM>

¹⁴ State of Texas Legislative Budget Board, *Statewide Criminal Justice Recidivism and Revocation Rates*, 2013, http://www.lbb.state.tx.us/Public_Safety_Criminal_Justice/RecRev_Rates/Statewide%20Criminal%20Justice%20Recidivism%20and%20Revocation%20Rates2012.pdf.

¹⁵ Federal Bureau of Investigation, Uniform Crime Reports.

¹⁶ Daniel S. Nagin, Francis T. Cullen, and Cheryl Leo Jonson, "Imprisonment and reoffending," in *Crime and Justice: A Review of Research* Vol. 38, ed. Michael Tonry (Chicago: University of Chicago Press, 2009); Paul Gendreau et al., "The Effects of Community Sanctions and Incarceration on Recidivism," in *Forum on Corrections Research* 12, 2012; Paula Smith, Claire Goggin and Paul Gendreau, "The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences," 2002, http://ccoso.org/library%20articles/200201_Gendreau_e.pdf; Patrice Villettaz, Martin Killias, and Isabel Zoder, "The Effects of Custodial vs. Noncustodial Sentences on Re-Offending: A Systematic Review of the State of Knowledge," (Philadelphia: The Campbell Collaboration Crime and Justice Group, 2006).

¹⁷ Nagin, "Imprisonment and Reoffending."

¹⁸ G. Matthew Snodgrass et al., "Does the Time Cause the Crime? An Examination of the Relationship Between Time Served and Reoffending in the Netherlands," *Criminology* 49, 2011; Thomas A. Mulvey et al., "Estimating a Dose-Response Relationship Between Length of Stay and Future Recidivism in Serious Juvenile Offenders," *Criminology* 47, 2009; National Council on Crime and Delinquency, "Accelerated Release: A Literature Review," 2008, http://www.nccdglobal.org/sites/default/files/publication_pdf/focus-literature-review.pdf; Bureau of Justice Statistics, "Recidivism of Prisoners Released in 1983," 1989, <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=1135>; Bureau of Justice Statistics, "Recidivism of Prisoners Released in 1994, 2002," <http://bjs.gov/content/pub/pdf/rpr94.pdf>; Paul Gendreau and Claire Goggin, "The Effects of Prison Sentences on Recidivism," 1999; Thomas Orsagh and Jong-Rong Chen, "The Effect of Time Served on Recidivism: An Interdisciplinary Theory," *Journal of Quantitative Criminology* 2, 1989; Washington State Institute for Public Policy, "Sentences for Adult Felons in Washington: Options to Address Prison Overcrowding," 2004, http://www.wsipp.wa.gov/ReportFile/879/Wsipp_Sentences-for-Adult-Felons-in-Washington-Options-to-Address-Prison-Overcrowding-Part-II-Recidivism-Analyses_Full-Report.pdf; Ilyana Kuziemko, "Going Off Parole: How the Elimination of Discretionary Prison Release Affects the Social Cost of Crime, National Bureau of Economic Research Working Paper, 2007, <http://www.nber.org/papers/w13380>.

¹⁹ Includes offenders revoked from probation, parole, house arrest, and earned release supervision.

²⁰ Washington Institute for Public Policy, "Inventory of evidence-based and research-based programs for adult corrections," 2013, http://www.wsipp.wa.gov/ReportFile/1542/Wsipp_Inventory-of-Evidence-Based-and-Research-Based-Programs-for-Adult-Corrections_Full-Report.pdf.

²¹ National Institute on Drug Abuse, "Principle of Drug Abuse Treatment for Criminal Justice Populations: A Research-Based Guide," 2006, <http://www.drugabuse.gov/publications/principles-drug-abuse-treatment-criminal-justice-populations>.

²² Washington State Institute for Public Policy, "Evidence-Based Public Policy Options to Reduce Crime and Criminal Justice Costs: Implications in Washington State," 2009, <http://www.wsipp.wa.gov/rptfiles/09-00-1201.pdf>.

²³ Drake, "Inventory of evidence-based and research-based programs for adult corrections."

²⁴ National Council for State Legislators, *Trends in Sentencing and Corrections*, 2013, <http://www.ncsl.org/Documents/CI/TrendsInSentencingAndCorrections.pdf>

²⁵ Associated Press, "Mississippi Will Cut Funding to Drug Courts," 2013 <http://www.cdispatch.com/news/article.asp?aid=24837&TRID=1&TID>.

²⁶ Pew Center on the States, *Formula for Success: Adding High Quality Pre-K to State School Funding Formulas*, 2010, http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Pre-k_education/Formula_for_Success.pdf?n=1406

CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing Brief of the Appellant with the Clerk of the Court using the MEC system. I further certify that I sent copies of the foregoing by United States Mail to the following:

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This **22nd** day of May, 2015.

s/Jacob W. Howard
Jacob W. Howard